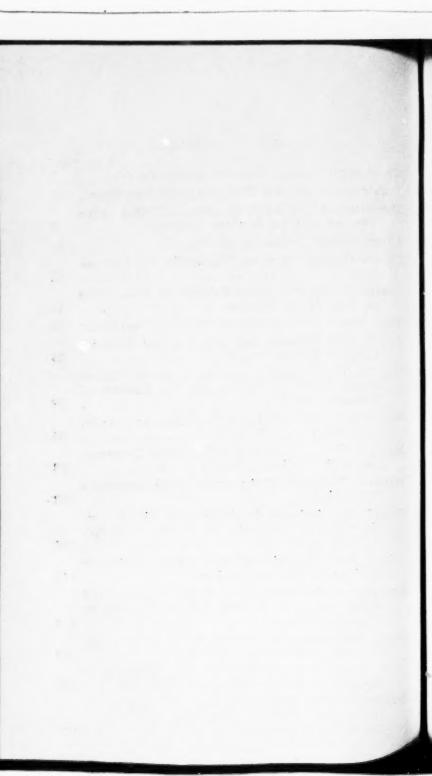
INDEX TO APPENDIX

	PAGE
Chronological List of Relevant Docket Entries	1
Unfair Labor Practice Charge Against Employer	6
Complaint and Notice of Hearing on Unfair Labor Practice Charge Against Employer	9
Excerpts from Testimony at Hearing	
General Counsel's Hearing Exhibit No. 2 — Chronology	
General Counsel's Hearing Exhibit No. 3 — Dates of Negotiation Sessions	3
Trial Examiner's Decision and Recommended Order	43
July 9, 1965 Decision and Order of the National Labor Relations Board	1
May 19, 1966 Opinions and Order of the United States Court of Appeals for the District of	
Columbia Circuit	
February 28, 1967 Motion of the Union to Clarify with Exhibits A through D	80
March 3, 1967 Opposition of H. K. Porter Company Inc. to the Motion to Clarify	93
March 8, 1967 Reply of the Union to the Company's Opposition	98
July 21, 1967 Motion of the Union Requesting Reconsideration of Its Motion to Clarify, with Exhibits A and B	
July 25, 1967 Opposition of the Company to Union's Motions for Reconsideration	3
December 8, 1967 Opinion and Order of the United States Court of Appeals for the District of Columbia Circuit	•
July 3, 1968 Supplemental Decision and Order of the National Labor Relations Board	
April 22, 1969 Order of the United States Court of Appeals for the District of Columbia Circuit.	•
October 13, 1969 Order of the Supreme Court of the United States Granting the Company's Petition for a Writ of Certiorari	1



APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER CO., INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

estall being on to he much smooth

100

0.00

Let the second of setting all

Chronological List of Relevant Docket Entries

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

H. K. PORTER COMPANY, INC., DISSTON DIVISION — DANVILLE WORKS, Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD, Respondent,

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Intervenor.

Docket No. 19,507

- 7-14-65 Petition to review and set aside order of the National Labor Relations Board filed by H. K. Porter Company, Inc.
- 8-2-65 Answer of the Board to petition for review and set aside order and cross-petition for enforcement.
- 8-2-65 Motion of Board to consolidate this case with No. 19,492.
- 8-17-65 Order consolidating this case with No. 19,-492.
- 3-22-66 Argued before Bazelon, Chief Judge; Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.
- 5-19-66 Opinion per Circuit Judge Wright.

- 5-19-66 Separate opinion by Senior Circuit Judge Wilbur K. Miller dissenting.
- 5-19-66 Judgment affirming order of the Board, and that it shall be enforced. Pursuant to Rule 38(b) the respondent shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.
- 5-31-66 Proposed decree.
- 6-28-66 Decree enforcing order of the Board. Senior Circuit Judge Wilbur K. Miller dissents.
- 6-29-66 Motion of the Steelworkers to intervene.
- 7-28-66 Per Curiam order allowing United Steelworkers of America, AFL-CIO to intervene in this case. CJ, Bazelon; Wilbur K. Miller, Sr. CJ & Wright, CJ. Senior Circuit Judge Wilbur K. Miller would deny the motion.
- 7-28-66 Certification from Clerk, Supreme Court, that petition for writ of certiorari was filed on July 28th (SC 392 OT 66)
- 10-19-66 Certified copy of order of the Supreme Court denying certiorari on October 10, 1966.
- 10-21-66 Certified copies of opinion and judgment filed May 19, 1966, and certified copy of enforcement decree filed June 28, 1966 issued to the National Labor Relations Board.
- 2-28-67 Intervenor's motion for leave to file motion to clarify decree, time having expired.
- 3-22-67 Per curiam order granting intervenor's motion for leave to file motion to clarify decree,

Relevant Docket Entries.

and denying motion to clarify decree. Bazelon, Chief Judge, and Wright Circuit Judge; Senior Circuit Judge Miller. Judge Miller did not participate in order.

- 3-22-67 Intervenor's motion to clarify decree.
- 3-22-67 Petitioner's objection to motion to clarify.
- 3-22-67 Intervenor's reply to objection to motion to clarify.
- 7-26-67 Petitioner's motion for leave to file motion requesting reconsideration of earlier motion to clarify.
- 12-8-67 Opinion Per Circuit Judge Wright.
- 12-8-67 Per Curiam order directing clerk to file lodged motion for reconsideration, opposition and the motion requesting oral argument; further ordered by the court that to the extent of the court's opinion issued this date the motion to clarify is granted; this case is remanded to the Board for reconsideration in light of the opinion CJ Bazelon, Wilbur K. Miller, Sr. CJ, Wright, CJ Sr. CJ Wilbur K. Miller dissents.
- 12-8-67 Intervenor's motion for reconsideration.
- 12-8-67 Intervenor's motion for oral argument.
- 12-8-67 Petitioner's opposition to intervenoir motion for reconsideration and for oral argument.
- 1-8-68 Certified copies of opinion and order filed December 8, 1967, issued to the National Labor Relations Board.

Relevant Docket Entries.

Docket No. 22,222

- 8-14-68 Proceedings transferred to this Court from U. S. Court of Appeals for the Fourth Circuit No. 12,607.
- 9-23-68 Cross application for enforcement of an order of the NLRB.
- 9-27-68 Per Curiam order allowing United Steelworkers to intervene.
- 10-15-68 Prehearing order approving stipulation as to issues and appendix. C. J. Bazelon.
- 10-15-68 Prehearing stipulation. Parties to operate under Rule 30(c).
- 4-21-69 Argued before CJ Bazelon; Miller, Sr. CJ and Wright, CJ. Court granted counsel for intervenor leave to lodge a memorandum of additional citations.
- 4-22-69 Per Curiam Order enforcing order of the Board CJ Bazelon, Wilbur K. Miller, SCJ, and Wright, CJ SCJ Wilbur K. Miller dissents.
- 5-5-69 Petitioner's motion for stay of mandate pending application for writ of certiorari.
- 5-27-69 Per Curiam order directing clerk to stay transmittal of the order of April 22nd for a period of 30 days from May 13th (June 12th) CJ Bazelon Miller, Sr. CJ and Wright, CJ.
- 5-27-69 Petitioner's motion for leave to supplement designation of record.

- 6-9-69 Order granting petitioner's motion to supplement designation of record.
- 6-9-69 Petitioner's designation of record for certification to Supreme Court.
- 6-10-69 Certified record prepared per designation and order of 6/9/69.
- 6-16-69 Notification from clerk, Supreme Court, for filing petition for certiorari on June 13th (1516, O.T. 68).
- 10-20-69 Certified copy of order of the Supreme Court granting certiorari on October 13th (S.C. No. 230 O.T. 69).

Charge Against Employer

UNITED STATES OF AMERICA National Labor Relations Board

CHARGE AGAINST EMPLOYER

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9(f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Case No. 5-CA-2785

Date Filed April 21, 1964

Compliance Status Checked By:

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

Name of Employer H. K. Porter Co., Inc., Disston Division-Danville Works

No. of Workers Employed Approx. 350

Address of Establishment (Street and Number, city, zone and State) DANVILLE, VIRGINIA

Nature of Employer's Business (State whether manufacturing, mining, construction, transportation, communication, other public utility, wholesale or retail trade, service, etc., and give principal product or type of service rendered.) MANUFACTURING

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and.....(5)...... of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge

The employer, in bargaining with the union for a contract, has taken a firm and uncompromising position that it will not agree to deduct union dues from the wages of employees pursuant to voluntary authorizations signed by employees in accordance with applicable law. The employer has taken this position for the sole purpose of assuring that no agreement will be reached, and not because of any valid objection to such wage deductions. The employer has, in the past, made deductions from employees' wages, pursuant to authorizations signed by the employees, for all other purposes, including: contributions to the United Fund, purchase of United States Savings Bonds, payments of premiums on optional insurance coverage under the employee insurance program in effect at the plant, purchase of safety shoes, etc. In these circumstances, the employer's position with respect to the deduction of union dues constitutes bad faith bargaining in violation of the Act.

- Full Name of Organization, Including Local Name and Number, or Person Filing Charge United Steelworkers of America
- Address (Street and number, city, zone, and State)
 c/o Feller, Bredhoff & Anker, 1001 Connecticut
 Ave, NW Washington, D.C. 20036
 Telephone No. 737-5353

Charge Against Employer.

- Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)
- 6. Address of National or International, if any (Street and number, city, zone and State)

 Telephone No. ———

7. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ JERRY D. ANKER

(Signature of representative or person filing charge)
4/20/64 JERRY D. ANKER, Attorney
(Date) (Title, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 80)

U.S. GOVERNMENT PRINTING OFFICE 16-57600-4

Complaint and Notice of Hearing UNITED STATES OF AMERICA National Labor Relations Board (Title omitted in printing)

COMPLAINT AND NOTICE OF HEARING

It having been charged by United Steelworkers of America, AFL-CIO (herein called the Union) that H. K. Porter Company, Inc., Disston Division - Danville Works (herein called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. 151, et seq. (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this complaint and notice of hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

I.

A copy of the charge filed in this matter on April 21, 1964 was served on Respondent on or about April 21, 1964.

П.

Respondent is, and at all times material herein has been, a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware and maintains a plant in Danville, Virginia, where it is engaged in the manufacture, sale and distribution of saws and other tools, Only the Danville plant is involved herein.

Ш.

During a representative 12 months' period, Respondent, in the course and conduct of its business

operations described in par. II above, sold and shipped finished products valued in excess of \$50,000 from its Danville plant directly to points outside the Commonwealth of Virginia.

IV.

Respondent is, and at all times material herein has been, engaged in commerce within the meaning of Section 2, subsection (6), of the Act.

V.

The Union is a labor organization within the meaning of Section 2, subsection (5), of the Act.

VI.

All production and maintenance employees of Respondent employed at its Danville, Virginia plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subsection (b), of the Act.

VII.

On September 27, 1961 a majority of the employees in the unit described in par. VI above, in a secret ballot election conducted under the supervision of the Regional Director for the Fifth Region of the National Labor Relations Board, in the matter of *H. K. Porter* Company, Inc., Case No. 5-RC-3572, designated and selected the Union as their representative for the purpose of collective bargaining with Respondent, and by virtue of Section 9, subsection (a), of the Act, at all times since that date has been and is now the exclusive representative of all the employees of Respondent in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment. On October 5, 1961 said Regional Director formally certified the Union as exclusive collective bargaining representative of the employees in said unit.

VIII.

On or about October 5, 1961, and on various dates thereafter, while Respondent was engaged in the operations described above in pars. II, III and IV, the Union requested Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other conditions of employment with the Union as exclusive representative of all the employees of Respondent in the unit described above in par. VI.

IX.

Since on or about October 21, 1963, and at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively in good faith with the Union as the exclusive representative of all the employees of Respondent in the unit described in par. VI above, in that Respondent negotiated with the Union in bad faith and with no intention of entering into a final or binding collective bargaining agreement by, inter alia, adamantly rejecting the Union's proposal for a provision for the deduction of union dues upon the proper authorization and request of individual employees.

X.

Respondent, by its refusal to bargain collectively with the Union as described in par. IX above, as the exclusive representative of its employees in the unit set forth in par. VI above, did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (a) (5), of the Act, and by said Acts and conduct did interfere with, restrain and coerce its employees and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8, subsection (a) (1), of the Act.

XI.

The activities of Respondent described in par. IX above, occurring in connection with the operations of Respondent described in pars. II, III and IV above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XII.

The acts of Respondent described above constitute unfair labor practices within the meaning of Section 8, subsections (a) (1) and (a) (5), and Section 2, subsections (6) and (7), of the Act.

PLEASE TAKE NOTICE that on the 6th day of October 1964 at 10:00 a.m. E.S.T. in the Federal Court Room, Post Office and Court House Building, Danville, Virginia, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the

right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that, unless you do so, all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Baltimore, Maryland this 10th day of August 1964.

JOHN A. PENELLO Regional Director National Labor Relations Board Region Five 707 N. Calvert St., Baltimore, Md.

[Seal]

Excepts From Testimony at Hearing

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD,

FIFTH REGION

In the Matter of:

H. K. PORTER COMPANY, INC.

DISSTON DIVISION — DANVILLE WORKS

and

United Steelworkers of America,

AFL-CIO

Case No. 5-CA-2785

U. S. Post Office Danville, Virginia

Tuesday, October 6, 1964

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

JOSEPH I. NACHMAN, Trial Examiner

APPEARANCES:

EDWARD J. GUTMAN, Esq.

707 N. Calvert Street, Baltimore, Maryland, appearing as counsel for General Counsel.

LLOYD C. JENKINS, Esq.

601 Grant Street, Pittsburgh, Pennsylvania, appearing for the respondent.

JERRY D. ANKER, Esq.

1001 Connecticut Avenue, Washington, D. C., appearing for the charging party.

[3] PROCEEDINGS

Trial Examiner Nachman: All right, gentlemen, if we are ready, the hearing will be in order please. This is a formal hearing before the National Labor Relations Board in the matter of H. K. Porter Company, Inc., Case No. 5-CA-2785.

[5] Mr. Gutman: I have prepared and have the report marked as General Counsel's Exhibit 2 a brief Chronology of some important dates, relative dates, to the issues that are facing you here; and I have placed a copy before you. I have had it marked as an exhibit, strictly so that it will have a place in the record. Its contended as a — for your consideration of the case.

Trial Examiner: Is there any objection to having that as an exhibit? I understand it has no importance or relevance except for the understanding of the past events.

Mr. Jenkins: We assume it to be true to counsel's general knowledge; we have no objections to admitting, subject to verification at a later date.

Trial Examiner: I will receive it on condition that if you discover any error or discrepancy, you can make the correction.

(Thereupon the document above — referred to was marked GC-2 for identification and was received in evidence)

[17] Mr. Jenkins: May I say one thing on that, sir; we will agree that perhaps our refusal to grant the check-off clause has been harrassment of the International Union. We do not think it has been a harrassment or coercion on the individual employees.

Trial Examiner: Counsel, I'm interested in the question of refusal to bargain; confine your remarks, if you confine your remarks to that, I think we will get along faster.

Mr. Jenkins: The only remarks we have on that, sir, is that we have refused to grant check-off.

Trial Examiner: That's admitted?

Mr. Jenkins: Yes, sir.

[19] BRUCE BLOODWORTH was called as a witness by and on behalf of counsel for General Counsel and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

- [20] Q. (By Mr. Gutman) You are representative for the United Steel Workers?
- A. Yes.
- Q. The charging party in this case?
- A. Yes.
- Q. Right?
- A. Right.
- Q. And in that position, you participated in contract negotiations with H. K. Porter Company?
- A. I have.
- Q. You testified in the hearing which we referred to, in a preceding case of H. K. Porter?
- A. I did.
- Q. Let me direct your attention to the period immediately following the Trial Examiner's Decision on that case, which according to Chronology which we submitted was on September 20, 1963; at that time, what was the status in regard to contract negotiations, were you meeting or not meeting when the Trial Examiner's Decision came out now?
- A. On the first case, you are talking about?
- Q. Yes.
- [21] A. No, we weren't meeting.
- Q. You testified in that earlier hearing that the last time that you had met prior to that hearing was November 27, 1962, do you recall that?
- A. Yes.

- Q. Is that correct?
- A. Yes.
- Q. Tell us what happened with regard to contract negotiations after the Trial Examiner's Decision in the earlier case?
- A. We were notified by the company that they were ready to begin the negotiations, and some time in August, I believe, we received a letter from the company, stating that we would set up dates to begin negotiations again.
- Q. Wait a minute; the Trial Examiner's Decision was September 20, 1963, so it couldn't have been August.
- A. Could I look at my notes; its been a long time.
- Q. Yes.
- A. October the 10th, we received the letter, 1963.

Trial Examiner: Had you been in communication with the company between September 20th, and October 10th?

The Witness: No.

- [22] Q. (By Mr. Gutman) After receiving that letter, the parties started meeting again?
- A. Yes.
- Q. On my instructions, did you go through your notes and prepare a list of the dates on which the parties met, following the Trial Examiner's Decision in that earlier case?
- A. Yes.
- Q. I hand you what has been marked as General Counsel's Exhibit 3 for identification, and ask you if this is the list that you prepared?
- A. Yes.

- Q. And that list shows the dates on which negotiation sessions were held between October 23, 1963 down to date?
- A. Yes.
- [23] Mr. Gutman: Now, this Exhibit No. 3, it shows that you met 21 times between October 23, 1963 and September 10, 1964. Now, during that period, has an agreement been reached on the terms of the contract?

The Witness: No.

[24] Trial Examiner: Suppose you tell me this; what are the items that are still under discussion and unresolved?

The Witness: Check-off; we just-

Trial Examiner: Check-off of union dues?

The Witness: That's right. And wages, insurance—

Trial Examiner: What kind of insurance? Health insurance, life insurance?

The Witness: Health insurance.

Trial Examiner: All right.

The Witness: And of course, wages comprise a number of things such as incentive, holidays, shift differentials, and things like that.

- [26] Q. In the earlier case, there was alleged that during the negotiations, or leading up to that case, that respondent had been insisting on the inclusion of the no-strike clause in a contract, and had refused to grant an arbitration; do you recall that?
- A. Yes, sir.
- Q. What has been the company's position on this item, sir? Since 1963.
- A. Up until August 25, 1964, they were adamant on this and [27] refused to budge either way on it.
- Q. What happened on August 25, 1964?
- A. They agreed to withdraw their demand for a nostrike clause, and also refused arbitration.

Trial Examiner: You mean they withdrew their position on arbitration?

The Witness: A no-strike clause; they still refused to give arbitration.

- Q. (By Mr. Gutman) But they dropped their demand for the no-strike clause, is that right?
- A. That's right.
- Q. How many times was this discussed in the 20 meetings up to that point?
- A. I would say every time.
- Q. And what reason, if any, was given by the company for refusing to grant an arbitration clause?
- A. They said that they would not have a third person coming in and settling any disputes.
- [28] Q. (By Mr. Gutman) I ask you whether the company's position on this arbitration no-strike item was the same or different?
- A. The same.

- Q. It was the same from October, '63 until August '64 as it was prior to the first hearing?
- A. That's right.
- [29] Q. Now you stated that your demands keeping the parties apart now are basically wages, insurance, and check-off; now, what's the union's demand on check-off?
- A. Well, we have repeatedly asked the company to check off dues, and of course, they have repeatedly refused. In the negotiations, numerous times, we have offered—
- Q. Let me ask you a question, first. What has been the reason, if any, given by the company for refusing?
- A. That said that it was the union's business, not theirs.
- Q. How often has that subject been discussed?
- A. I would say every meeting.
- Q. Now, did the union suggest any alternative proposals?
- A. Yes, on a number of occasions, we asked the company to give us the privilege of having our financial secretary get in a niche somewhere and collect dues during lunch hour and before and after work. They refused to do that; we asked that our shop stewards be allowed to collect dues during lunch periods and before and after the work hours, and they refused to do that.
- Q. Did you specify what type of areas this collection would be made?
- A. Well, anywhere where people were gathered, eating lunch, or when they were coming into work or after they were finished work.

- Q. And what was the company's reaction on that, and their answer?
- [30] A. It was still the same. That they would not do it.
- Q. And did they give any reason other than the reasons stated before?
- A. No.
- Q. How many employees are in the unit that you represent, Mr. Bloodworth?
- A. At the time of the election, I believe 302.
- Q. And at the present time; do you know how many there are?
- A. Well, I would say approximately the same, or maybe a few more. I'm not sure.
- Q. How often does your union collect dues?
- A. Once a month.
- Q. Does your union maintain an office in the Danville area?
- A. No.
- Q. You have no clerical staff in the Danville area?
- A. No.

Trial Examiner: Where is the closest office?

The Witness: What?

Trial Examiner: Where is the closest office?

The Witness: Roanoke, Virginia.

Trial Examiner: And that's how far?

The Witness: About 85 miles, I guess, approximately.

Q. (By Mr. Gutman) Over how large a geographic area — I'm speaking of the radius from Danville do the employees of the [31] unit live?

- A. I'm not positive, but I would say 35 to 40 miles.
- Q. Now if you weren't able well, let me ask you this; are you at the present time collecting dues?
- A. No.
- Q. If you would collect dues without a check-off, how would you go about it?
- A. Well, we would either have to have our shop stewards call on people at home, or we would have to set up an office in Danville here, and maintain a staff there.

Mr. Gutman: I have nothing further.

Trial Examiner: Does the charging party wish to examine this witness?

Mr. Anker: I just have a couple of questions.

- Q. (By Mr. Anker) How many employes are there in this unit, approximately?
- A. You mean-
- Q. In the H. K. Porter plant.
- A. At the time of the election, 302, I believe, were eligible to vote; but I would not know exactly; there might be a few more or a few less at the present time; I'm not sure.
- Q. Under the present dues structure of the Steel Workers Union, would the dues paid by that number of people be sufficient to support a full-time office staff in Danville, Virginia?
- A. It would not.
- [32] Q. How long have you been a union representative?
- A. A little over 18 years.
- Q. On the basis of your experience, in that capacity, would you say that there is any feasible way for a

union in the situation of this local union to collect dues other than by check-off or at the plant?

A. I would think not.

Mr. Anker: I have no further questions.

Trial Examiner: Any cross examination?

Mr. Jenkins: Thank you.

CROSS EXAMINATION

- [36] Q. To your knowlege and your belief, has the question regarding arbitration and a no-strike clause been satisfactorily resolved between the parties?
- A. Repeat that, will you please, sir?
- [37] Q. I said to your knowledge and belief, has the question of the no-strike clause and the arbitration clause been satisfactorily resolved by the parties?
- A. Not satisfactorily; but we have agreed.
- Q. Its no longer an issue?
- A. No.

[40] FURTHER REDIRECT EXAMINATION

- Q. (By Mr. Anker) Did you, Mr. Bloodworth, during these negotiations, did you or did you not offer to sign an agreement with this company without the check-off clause?
- A. I believe at one time we offered to sign an agreement with them, and waive the check-off clause for six months.
- Q. Did you offer to waive the check-off clause for more than six months, if you had some other method of collecting dues?
- A. Oh, yes. We made that proposition many times.

Trial Examiner: You mean these alternatives?

The Witness: That's right.

- Q. (By Mr. Anker) Just so the record is clear, now; specifically, what proposition did you make; or let me ask it this way; specifically, what kind of a contract did you tell the company that you would be willing to sign without a check-off?
- A. If they would let us put our financial secretary into some spot in the plant during the lunch periods, or before and after [41] working hours, to collect dues, and if they would not do that, if they would let our shop stewards collect dues in the plant, on the property before and after work or during lunch periods.

[42] T. C. JONES was called as a witness by and on behalf of the counsel for General Counsel, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

- [43] Q. And you are the Plant Manager of H. K. Porter Company?
- A. I am.
- Q. The respondent in this case?
- A. Yes, sir.
- Q. How long have you been Plant Manager out there?
- A. February, 1962.
- Q. You are the top man at the Danville plant?
- A. I like to think I am.

Trial Examiner: Well, are you or not?

The Witness: Yes, sir.

- Q. (By Mr. Gutman) I'll be right direct with you, Mr. Jones, does your company, or has your company in the past made any deductions from payroll, other than those required by law?
- A. Yes, sir.
- Q. Would you name what the purpose was for which those deductions were made?
- A. We deduct Treasure Bonds.
- Q. United States Savings Bonds?
- A. The United States Savings Bonds. We deduct dependents coverage on the insurance policy; we deduct —

Trial Examiner: That's health insurance?

The Witnes: Yes, sir. And we deduct a United Fund and Good Neighbor Fund.

Trial Examiner: I couldn't hear the last part of your answer; [44] United Fund and what?

The Witness: And the Good Neighbor Fund, which we quit over a year ago.

- Q. (By Mr. Gutman) The United Fund?
- A. Is the local agency.
- Q. The local charitable drive that's held once a year?
- A. Yes, sir.
- Q. And you make deductions from employees' payrolls toward the contribution?
- A. Yes.
- Q. Now what is this Good Neighbor Fund that you referred to?
- A. The Good Neighbor fund that we had, used to be ten cents deducted, that the employee could designate to be deducted, and this was used when somebody passed away, to send flowers to the family of the bereaved, or somebody in the hospital, to send flowers; or to make donations — like they made a donation to the Roman Eagle, the Masonic Home; or donations to the Danville Lifesaving Crew, or if they decided they wanted to have a picnic or a Christmas party, they used this fund.
- Q. Now there were many issues to which it could be used — the money in the Good Neighbor Fund. And its a fact that that fund was administered by an organization called the Employees' Activities Committee, whose members were selected by their fellow employees, for a period of one year?
- A. Yes.

[45] Q. Is that correct?

- A. Yes, sir.
- Q. Would you tell us how often these various deductions are made?
- A. Weekly.
- Q. They are on a weekly basis?
- A. That is the United Fund. The Bonds, the United States Savings Bonds, once a month; and insurance, once a month.
- Q. And how often was the Good Neighbor Fund collected?
- A. That was weekly then.

'It has been discontinued, you know.

- Q. Tell us when that was discontinued?
- A. I think it was roughly a year ago.
- Q. About a year ago?
- A. Yes.
- Q. Were all these deductions authorized by empolyees?
- A. Yes, sir.
- Q. In writing?
- A. Yes, sir.
- Q. They signed their statements and the company has the right to take off so much a week or month or as the case may be, for the stated purpose?
- A. Yes, sir.
- [46] Q. (By Mr. Gutman) One more question; do the payroll stubs which accompany your payroll checks; first of all — they are printed? The payroll stubs are printed and they are attached to your payroll checks?
- A. Yes; its part of the check.
- Q. Excuse me?

- A. Its part of the check.
- Q. And they contain a place for a Good Neighbor deduction?
- A. Yes.
- Q. Printed right on the form?
- A. Yes. That is used exclusively for United Fund.
- Q. Now that's used for the United Fund?
- A. Yes, sir.
- Q. At one time it was used for both the Good Neighbor Fund and United Fund?
- A. Yes, sir.
- [47] Q. Does it also contain a space, a hospital deduction?
- A. Yes; you have one in front of you there.
- Q. And it shows that deduction?
- A. Yes, sir.

Trial Examiner: Any examination by the charging party?

- [48] Mr. Anker: A few questions.
- Q. (By Mr. Anker) Mr. Jones, you were in the room when Mr. Bloodworth testified, were you not?
- A. Yes, sir.
- Q. His testimony was that the subject was discussed, the subject of check-off was discussed at almost all of your meetings; and the company's consistent position has been that you will not check off union dues, is that correct?
- A. That's correct.
- Q. He also testified that the union offered to withdraw his request for check-off, if the company were willing to agree to some kind of an arrangement,

whereby the union could collect its dues in the plant, from employees during periods when they were not working?

- A. That is correct.
- Q. They made that offer?
- A. Yes, sir.
- Q. What was your position on that?
- My position is and was then that that's union business.
- Q. And therefore-
- A. They could colect their own dues at their own meetings or at their offices.
- Q. Your position that you would not permit this on the plant grounds?
- A. Yes, sir.
- [49] Q. You have never taken the position, have you, that there was any inconvenience to the company in checking off union dues?
- A. To the best of my knowledge, no, sir, we have not.
- Q. In point of fact, there would be no more inconvenience, would it, then checking off Savings Bonds or insurance coverage or United Fund contributions, or any other item?
- A. That's right.
- Q. As I understand your testimony, I want to get this clear, your sole reason for rejecting the demand for a check-off or for dues collection in the plant was that this was union business?
- A. Right; this was union business, and the union should collect their own business; yes, sir. And I should have nothing to do with it.
- Q. I have no further questions.

Trial Examiner: Do I understand correctly, Mr. Jones, that you were the company's chief negotiator at the bargaining sessions?

The Witness: Yes, sir.

Trial Examiner: And is it also correct that beginning with the first meeting on October 23, 1963, and down to the one on September 10, 1964, you were present at each meeting?

The Witness: Yes, sir, I don't think I missed any.

Trial Examiner: Go ahead. Cross examination.

[50] Cross Examination

- [51] Q. (By Mr. Jenkins) Have you at any time refused to grant the union's demand for a check-off clause for the sole purpose of preventing the parties from reaching an agreement?
- A. No, sir, I have not. The check-off, it is union business and I should have nothing to do with it.
- Q. What is your position in regards to collection of union dues?
- A. That the union should collect their own dues at their own meeting, away from company time, and away from company property.

Trial Examiner: What is your objection to a union official collecting it from employees at the lunch hour, or when coming to or leaving work?

The Witness: I just think that I should not help the union collect their dues, and this is what I am doing, when I let them collect it on company property, when they can go right to their union meetings that they hold here and collect the dues at the regular meetings they have in town.

Trial Examiner: Suppose they stationed someone at the street entrance of the plant, at the driveway at the plant; would you have an objection to that?

The Witness: Well, I think they would be on State property; I don't know what the State would say about that.

[52] Trial Examiner: I say would you have an objection?

The Witness: The only objections I would have would be to collecting union dues on company property; if it was off company property, I don't see where I would have any say-so about that.

[53] Q. As I understand your testimony, the reason for refusing to grant check-off or collection of union dues, was that you were not going to aid and comfort the union, in the union business?

A. Yes, sir, that's right.

Excerpts From Testimony at Hearing.

REDIRECT EXAMINATION

- [55] Q. (By Mr. Anker) Is there a company policy, that is a policy of H. K. Porter Company, against the check-off of union dues?
- A. We do have some contracts at some of our plants that do have check-offs; I do know that.
- Q. Is there, to your knowledge, a company policy against the check-off?
- A. Being a company policy, not that I know of.
- Q. Is there a company policy against the collection of union dues on company property?
- A. Not any that I am aware of.
- Q. So your position on these matters is not dictated by company policy?
- A. That is correct.
- Q. Who, then, makes these decisions for the company; who decided to say no to these union demands; who makes that decision?
- A. As plant manager, I would make that decision, as chief negotiator.
- [56] Q. And you would also make the decision as to whether or not the union would be permitted to collect dues at the plant gate?
- A. Well, if it was off company property, I don't have any say-so about that.
- Q. But if it was on the edge of the company property, that would be your decision?
- Well, I can't make any decision affecting anybody else's property.

Trial Examiner: I can't hear you, sir.

The Witness: I can't make any decision affecting anybody else's property. Excerpts From Testimony at Hearing.

Trial Examiner: His question is that assuming that this is on company property, it may be at the very edge of it?

The Witness: I would object to it if it was on company property, yes, sir.

Trial Examiner: That would be your decision?

The Witness: Yes, sir.

[75] Trial Examiner: All right, sir; I'll hear from the respondent now. Before I do — you were to check General Counsel's Exhibit 3 and let me know—

Mr. Jenkins: We agree that it is authentic.

Trial Examiner: I will now receive General Counsel's Exhibit 3.

[76] (The document heretofore referred to was marked for identification as GC-3, and was received in evidence)

Mr. Jenkins: Mr. Trial Examiner, we've got very little to say. Both counsel have gone to great lengths to give us their opinion of why we have not done something; they agreed that we are not required by law to do it; they simply state that if you pick our brains, and come up with a malignancy, that says the reason we did not do this was to prevent a union, prevent a contract, then we are illegal; they have not shown such a malignancy, and they cannot show it because it is not there.

Trial Examiner: Let me ask you this, first; do you agree that if the finder of fact came to that conclusion, would that be the answer to this case; in other words, that's the turning point in this case?

Mr. Jenkins: We agree that that's the turning point of the case, yes, sir.

We point out, now, sir, that elsewhere, in H. K. Porter and elsewhere in industry, there are contracts that have union dues check-offs; those of which I am personally familiar arrived, the check-off clause was put in the contract because of economic pressures put on the bargaining by the union.

Trial Examiner: I am confined to this record, and I have to confine you to the record. Its in the record that there are other contracts with the H. K. Porter Company that have [77] union check-off provisions; and there is nothing in the record as to why they have.

Mr. Jenkins: What I was going to say is this, that the proper relief and the proper manner for the union to press their demand against the hard bargaining of the company is by use of their economic pressures, and not by coming to the Board and asking the Board to grant them union dues check-off" Its a subject that is mandatory for bargaining; it is not one — and counsel agrees — that we do not have to grant; if they feel that our reason for not doing is as they have stated, then they have economic pressures that they could

put against us, and use those economic pressures to change our opinion.

Trial Examiner: They don't have to, though.

Mr. Jenkins: That, I think, is debateable, sir, whether they do or not; again, we get down to the turning point.

Trial Examiner: I suppose economic pressure is a strike?

Mr. Jenkins: Yes, sir.

Trial Examiner: They don't have to call a strike; if there's other ways—

Mr. Jenkins: Well, that gets back again, as you say, to the turning point of this case; whether our sole purpose in denying check-off was to prevent a signing of an agreement, then we state our purpose was that we were not going to aid and comfort the International Union at this location.

[8

[80] Trial Examiner: Counsel has pointed to certain facts in the record that he argues should support, and asked me to draw the inference of bad faith bargaining. Now, if you will summarize your evidence and give me the facts which you think should dictate the contrary, then we will have an issue drawn; and then I hope I will be able to reach a decision.

Mr. Jenkins: Well, sir, you stated just now that they have referred to certain facts; and okay, we agree that they have, to certain testimony, to certain proof. We say that their whole summation was not that these things bear out what they are saying, but that you should surmise and read behind
these facts; we agreed to most of the testimony
that was here; we would have stipulated everything. We do have check-offs or deductions for payrolls for other things; we think that the fact that
we have it has no bearing on whether or not we
have to have a deduction for union dues. The law requires—

Trial Examiner: Isn't the fact that you grant it in one place and not at another, I'm not saying that that's controlling, but doesn't it have some evidentury weight that this position was taken here for a purpose?

Mr. Jenkins: Well, certainly, and we have stated our purpose; we have stated it plainly here many times, that our purpose in denying check-off was that we were not going to aid and comfort the union; it had nothing to do with blocking; it had nothing to do with blocking reaching an agreement, sir.

[81] Trial Examiner: It has the same effect in every other plant we do have such an agreement.

Mr. Jenkins: Are we going into outside plants or not, sir, there again.

Trial Examiner: The record here shows that that provision does exist in contracts at other plants.

Mr. Jenkins: It has been alleged that that provision is in other contracts, yes, sir.

Trial Examiner: Your witness, Mr. Jones, admitted that it does exist. Now, in those places where

it exists, doesn't it have exactly the same effect that it would in this particular plant; it aids and abets the union in collection of dues?

Mr. Jenkins: And in — yes; and in those plants, we are forced to do it because of economic pressures of the union to grant them that clause; not because of any other reason. We took the same position here that we would not grant the union a check-off, that we would not let them have — most of our contracts read that there will be no conduct of union business on company property, on company time.

Trial Examiner: Why don't you want them, aside from the fact that you don't want to aid the union; is there any other disadvantage to the company, or detriment to the company by having them collect dues during non-work hours?

Mr. Jenkins: Only one that would not necessarily be a hard-[82]ship or anything else — the added confusion in a plant such as ours; the added risk of an outsider who is not familiar with the layout of the plant; perhaps suffering from injury or something — other than that, there would be no objection.

Mr. Jenkins: Well, sir, I'm just not prepared or qualified to go down through the evidence point by point other than saying that it is our strong conviction that we did not come to the bargaining table with the intent of denying check-off for the sole purpose of preventing an agreement. We claim that we have presented offers, counter-offers, and complete agreements to [83] the union, which we were ready, able, and willing to sign. Now, the union

comes before you and says that because you do not include in those documents a provision for either (1) union dues check-off or (2) a manner in which they could collect the union dues on our property, that we have violated the law. We say that we have violated the law no more in our position than they have in theirs; that they will not sign a contract without such a clause or provision being included into it. Now, as we understand the law, and has been employed by the Board, we are not required to make concessions; we have made known to the bargaining representatives our reasons for not granting them their various requests; why their counter proposals weren't satisfactory to us, and we continue to hear from the union that "Mr. Employer, we are going to get union dues check-offs; either you give it to us, or we are going to haul you before the Board". Today, we are before the Board, and they would ask that you grant them something that they cannot get any other way.

Trial Examiner: No; I don't think that's the result at all. I think that most that could happen here, assumed that I agree with the General Counsel's case, is that I will order the company to bargain over that issue; that doesn't mean that you have to agree to it.

Mr. Jenkins: So we bargain for another 20 or 200 or 400 meetings —

[84] Trial Examiner: Its a question of whether you bargain in good faith; if the conclusion is that you bargain in good faith, and don't reach an agreement, Excerpts From Testimony at Hearing.

its just an impasse, that's all; that happens lots of times.

Mr. Jenkins: Yes, sir, and I have been in a number of them; in fact, I've got two going on right now.

Trial Examiner: If that impasse has been brought about by bad faith bargaining, then its bad faith.

Mr. Jenkins: Well, sir, we can only tell you that we came to the bargaining table as we came to this hearing; with a sound firm position that we would not deny check-off for the sole purpose of denying, as claimed in the Petition, denying the union a contract.

Trial Examiner: Well, I suppose I should expect that; if you said to the contrary, we wouldn't have a case.

General Counsel's Exhibit No. 2.

General Counsel's Exhibit No. 2

CHRONOLOGY

- September 27, 1961 Election in Case No. 5-RC-2572.
- 2. October 5, 1961 Union certified by Board.
- January 24, 1963 Charge filed by Union in Case No. 5-CA-2344.
- April 22, 1963 Complaint in Case No. 5-CA-2344.
- May 23, 1963 Hearing in Case No. 5-CA-2344.
- September 20, 1963 Trial Examiner's Decision in Case No. 5-CA-2344.
- April 15, 1964 Board Order in Case No. 5-CA-2344.
- 8. April 21, 1964 Charge filed herein.
- July 17, 1964 Decree of Fourth Circuit enforcing Board Order in Case No. 5-CA-2344.
- 10. August 10, 1964 Complaint issued herein.

General Counsel's Exhibit No. 3.

General Counsel's Exhibit No. 3

NEGOTIATION SESSIONS BETWEEN UNITED STEELWORKERS AND H. K. PORTER SINCE SEPTEMBER 20, 1963

1.	October 23, 1963	11.	March 24, 1964
2.	October 29, 1963	12.	April 7, 1964
3.	November 13, 1963	13.	April 14, 1964
4.	November 26, 1963	14.	April 28, 1964
5.	December 4, 1963	15.	May 12, 1964
6.	January 8, 1964	16.	June 3, 1964
7.	January 22, 1964	17.	July 2, 1964
8.	February 11, 1964	18.	July 28, 1964
9.	March 10, 1964	19.	August 11, 1964
10.	March 11, 1964	20.	August 25, 1964
		21.	September 10, 196

Trial Examiner's Decision

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

H. K. PORTER COMPANY, INC.,
DISSTON DIVISION-DANVILLE WORKS
and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

Case No. 5-CA-2785

Edward J. Gutman, Esq., of Baltimore, Md., for the General Counsel.

Jerry D. Anker, Esq., of Washington, D. C., for the Charging Union.

Mr. Lloyd C. Jenkins, Pittsburgh, Pa., for the Respondent.

Before: Joseph I. Nachman, Trial Examiner.

TRIAL EXAMINER'S DECISION STATEMENT OF THE CASE

This complaint, under Section 10(b) of the National Labor Relations Act (herein called the Act), charges that H. K. Porter Company, Inc., Disston Division, Danville Works (herein called Respondent or Company), since on or about October 21, 1963, violated Section 8(a) (5) of the Act by refusing to bargain with

^{1.} Issued August 10, on a charge filed and served April 21. All dates mentioned are 1964, unless otherwise noted.

United Steelworkers of America, AFL-CIO (herein called the Union), the duly certified representative of Respondent's employees involved in this proceeding. The matter was duly heard before the undersigned Trial Examiner at Danville, Virginia, on October 6. 1964, with all parties represented and participating in the hearing. Full opportunity was afforded all parties to present pertinent evidence, to examine and cross-examine witnesses, to argue orally on the record, and to submit briefs. Oral argument was presented and is included in the transcript of proceedings at the hearing. Additionally, a formal brief has been received from the Union and from Respondent, respectively, and further arguments in letter form have been received from the General Counsel. All arguments submitted as aforesaid. have been duly considered.

Upon the entire record in the case and my observation of the witnesses, including their demeanor while testifying, I make the following:

FINDINGS OF FACT²

I. THE UNFAIR LABOR PRACTICES ALLEGED

A. Background

Following a secret ballot election, the Regional Director for the Fifth Region of the Board, on October 5, 1961, certified the Union as the collective-Bargaining representative of all production employees at Respond-

^{2.} No issue of commerce or labor organization is presented. The complaint alleges and the answer admits facts which adequately establish both elements. I find the facts as pleaded. Likewise, no unit question is presented. The unit was fixed in the representation proceeding, and I find the same to be appropriate.

ent's Danville, Virginia, plant excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. The unit comprises about 300 employees who live within a radius of 35 to 40 miles from Danville. The Union maintains no office in Danville, that area being serviced from the Union's office in Roanoke, a distance of about 85 miles.³

Following the certification, and through November 27, 1962, the parties had 28 bargaining sessions, but no agreement was reached. The chief negotiator for Respondent at the meetings was Plant Manager Jones. Based on charges filed by the Union, the Regional Director, on April 22, 1963, issued a complaint charging Respondent with bad-faith bargaining during the aforementioned negotiations (Case No. 5-CA-2344). That complaint was heard before Trial Examiner Ramey Donovan on May 23, 1963, and his Decision issued September 20, 1963. He found that in the aforementioned negotiations, the main items that kept the parties apart were, in addition to money matters, Respondent's refusal to agree to (1) an arbitration provision although it insisted on a no-strike clause; and (2) a dues checkoff provision. Trial Examiner Donovan concluded that Respondent's position on the arbitration and no-strike provisions, and its unilateral changes in certain working conditions (which it had refused to grant to the

^{3.} The uncontroverted testimony is to the effect that the Union's membership in the Danville area does not justify the maintenance of an office in that area, but one of the Union's members employed by Respondent, maintains some files and records at his home, and mail relating to the Union's business in Danville may be addressed to the home of that individual.

Union), demonstrated that its bargaining during the aforementioned negotiations, was not in good faith. The Trial Examiner's Recommended Order required Respondent to cease and desist from refusing to bargain with the Union; upon request to bargain with the Union, and to post appropriate notices. No exceptions having been filed, the Board on April 15, 1964, adopted the Trial Examiner's Recommended Order.4

B. The current facts

After issuance of Trial Examiner Donovan's Decision, Respondent and the Union resumed bargaining, the first meting being held October 23, 1963. Between that date and September 10, 1964, a total of 21 meetings were held,⁵ but no agreement was reached. Plant Manager Jones was again Respondent's chief negotiator, attending all bargaining sessions on and after October 23, 1963. When bargaining negotiations were resumed, some 14 items were open and unresolved. During the negotiations which followed, each of the parties withdraw certain of its bargaining proposals,⁶ so that upon

 On July 17, 1964, the United States Court of Appeals for the Fourth Circuit entered a Decree summarily enforcing the Board's Order.

5. The precise meeting dates were (1) October 23, 1963; (2) October 29, 1963; (3) November 13, 1963; (4) November 26, 1963; (5) December 4, 1963; (6) January 8; (7) January 22; (8) February 11; (9) March 10; (10) March 11; (11) March 24; (12) April 7; (13) April 14; (14) April 28; (15) May 12; (16) June 3; (17) July 2; (18) July 28; (19) August 11; (20) August 25; and (21) September 10; meetings 6 through 21 being in 1964. Since September 10, no meetings have been held.

6. For example the Union withdrew its demand for arbitration, and Respondent withdrew its demand for a no-strike clause.

adjournment of the final meeting on September 10. only 3 items remained unresolved. These were wages, health and life insurance, and checkoff. It is undisputed that checkoff was discussed at virtually each of the 21 meetings held after negotiations were resumed on October 23, 1963, and that Respondent refused to grant the Union's request in that regard contending that the collection of union dues was the Union's business which Respondent should not foster or promote. In view of this position by Respondent, the Union's negotiator proposed, at several meetings, two alternatives, namely (1) that its financial secretary be given access to the plant for a given period of time when dues were due, with leave to contact the employees during the lunch period, or before or after work; or (2) that the Union's stewards be permitted to collect dues in the plant during nonworking hours. Both of these suggestions were rejected by Plant Manager Jones on the ground ". . . we are not going to aid and comfort the International Union at this location" and "I should not help the Union collect their dues. and this is what I am doing when I let them collect it on company property . . ."

Jones admitted that his objection to the Union's demand for a checkoff, and the alternatives advanced by the Union, was not a matter of company policy, but was a decision made by him as manager of the one plant involved, and Respondent's chief negotiator; that in fact other plants of Respondent have union contracts containing a checkoff provision, but claims that these came into existence because of the economic strength of the Union at the particular plant. Jones also admitted that his refusal to check off union dues was not based on inconvenience to Respondent; that it would be no more in-

convenient than checking off for the purchase of U.S. Savings Bonds, dependents coverage under health insurance, United Givers Fund, and a Good Neighbor Fund, for which Respondent does deduct from its employee's wages when appropriately authorized.⁷

CONTENTIONS AND CONCLUDING FINDINGS

There can be no doubt that check off is a mandatory subject of collective bargaining, and that with respect to such issue either party may bargain to an impasse provided such bargaining is in good-faith. N.L.R.B. v. Borg-Warner Corporation, 356 U.S. 342. And Section 8(d) of the Act provides that nothing therein shall be construed as requiring either party to agree to a proposal, or the making of a concession. But this statutory right to refuse to agree to a particular proposal or to make a concession, may not be used "as a cloak . . to conceal purposeful strategy to make bargaining futile or fail." N.L.R.B. v. Herman Sausage Co., 275 F. 2d 229, 232 (C. A. 5). In short, what is required is a good-faith approach to the issues between the parties with a serious intent to reach ultimate agreement on an acceptable common ground. N.L.R.B. v. Insurance Agents, 361 U.S. 477.

The narrow issue thus presented by this record, is whether, as the General Counsel contends, Respondent's position on the Union's demands for a check off was a mere device to frustrate agreement on a contract, or

^{7.} The Good Neighbor Fund was a weekly deduction of 10 cents to cover the expense of sending flowers to a sick fellow employee, donation to some charity, and other like matters. It was discontinued about a year prior to the hearing herein.

whether, as Respondent contends, it was merely engaging in "hard bargaining," with no intention of preventing an agreement. My careful consideration of the entire record convinces me that Plant Manager Jones, Respondent's chief negotiator, took the position he did with respect to the check off issue, for the purpose of frustrating agreement with the Union, and hence engaged in bad-faith bargaining. I base this conclusion on the following factors:

1. In the prior case Jones' surface bargaining, designed to frustrate agreement with the Union, except on the terms he adamantly insisted upon, was established. Indeed the excerpts from Jones' testimony in the prior case, quoted in Trial Examiner Donovan's Decision, clearly demonstrate his antiunion animus, and his attitude that the Union was an evil he was required by law to tolerate and deal with, but he would prevent it from having any more voice in the working conditions of the employees than he was required to permit, and would seize any opportunity that presented itself to embarrass the Union in the sight of its employee members. Jones' demeanor while testifying in the instant proceeding, convinced me that his attitude toward collective bargaining had not changed since he testifed in the prior case.8

^{8.} I fully recognize that because an employer engaged in bad-faith bargaining in one set of negotiations, it does not necessarily follow that the employer's subsequent bargaining negotiations were conducted in bad faith. I merely hold that an employer's bad-faith bargaining in the prior negotiations is a factor to be considered, along with the other circumstances of the case, in determining whether his subsequent bargaining was in good faith.

- 2. Jones' explanation for his refusal to agree to any of the Union's suggestions for the collection of its dues, namely, that he did not wish to give aid and comfort to the Union by assisting it in collecting dues, if not actually a false reason, evidences an attitude inconsistent with the obligation imposed upon an employer by the Act. The very act of bargaining with a union, thus granting it recognition as the representative of the employees, in and of itself gives aid, comfort, assistance and prestige to that Union. But the policies of the Act. and the basic principles upon which it rests, requires an employer to give this kind of "aid and comfort" to the designated representatives of its employees. For, as the Board had held in a somewhat comparable situation, it is inconsistent with the bargaining obligation which the Act imposes upon an employer for the latter to conduct negotiations with the statutory representative in such a manner as to disparage or discredit the statutory representative in the eyes of its employee constituents. General Electric Company, 150 NLRB No. 36.
- 3. In the instant case Respondent seeks to explain away the fact that at other plants it has contracts with unions which provide for a check off, by arguing, in substance, that those provisions were brought about by reason of the economic strength of the union there involved, and urges that the Union's remedy in this case was to call a strike rather than prosecute an unfair labor practice charge. Not only does such a position by an employer run counter to the objectives of the Act which Congress set forth in its statement of "Findings and Policies" (see Section 1 of the Act), but it also demonstrates that Respondent's purpose was to forestall reaching an agreement with the Union by the expedient

of disparaging the latter in the eyes of the employees. Cf. Sunbeam Plastic Corporation, 144 NLRB 1010. This would seem to be particularly true in view of Respondent's admission that checking off union dues would impose no burden upon it, and its admitted check off for Government Bond and United Givers Fund, neither of which seem particularly necessary for the promotion of Respondent's business.

Accordingly, I find and conclude that with respect to the issue of check off, Respondent bargained with the Union from October 23, 1963, through September 10, 1964, in bad faith and thereby violated Section 8(a) (5) and (1) of the Act⁹.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I made the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

^{9.} This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled. Also, I find it unnecessary to pass on the contention advanced by the Charging Union, but not urged by the General Counsel, that Respondent independently violated Section 8(a) (5) and (1) of the Act, by rejecting the Union's alternatives to its original checkoff proposal, because in any event the order which I shall recommend would be the same.

- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By failing to bargain in good faith with the Union over the issue of check off, as set forth above, Respondent engaged in, and is engaging in unfair labor practices proscribed by Section 8(a) (5) and (1) of the Act.
- 4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom, and that it take the affirmative action hereafter set forth, which is deemed necessary to effectuate the policies of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that H. K. Porter Company, Inc., its officers, agents, successors and assigns, shall;

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steel Workers of America, AFL-CIO, as the exclusive collective-bargaining representative of its employees in a unit composed of all production and maintenance employees at its Danville, Virginia, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in said Act, with respect to

rates of pay, wages, hours of employment, and other terms and conditions of employment.

- (b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.
- Take the following affirmative action found necessary to effectuate the policies of said Act:
- (a) Upon request bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive representative of the employees in the aforesaid unit, and embody any understanding reached into a signed contract.
- (b) Post at its plant in Danville, Virginia, copies of the notice attached hereto marked "Appendix." 10 Copies of said notice to be furnished by the Regional Director for the Fifth Region of the Board (Baltimore, Maryland), shall, after being signed by an authorized representative of Respondent, be posted by Respondent

^{10.} In the event this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be inforced by a decree of a United States Court of Appeals the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within 20 days from the date hereof, what steps it has taken to comply herewith.¹¹

Dated at Washington, D.C.

/s/ Joseph I. Nachman Joseph I. Nachman Trial Examiner

(Appendix to Decision omitted in printing)

^{11.} If this Recommend Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order, what steps Respondents have taken to comply herewith."

Decision and Order of July 9, 1965.

Decision and Order of July 9, 1985

153 NLRB No. 119

D-8108 Danville, Va.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

H. K. PORTER COMPANY, INC.

DISSTON DIVISION-DANVILLE WORKS

and

UNITED STEELWORKERS OF AMERICA,

AFL-CIO

Case No. 5-CA-2785

DECISION AND ORDER

On January 21, 1965, Trial Examiner Joseph I. Nachman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs. The Charging Party filed cross-exceptions and a brief in support thereof and in opposition to the exceptions filed by the Respondent. Thereafter, Respondent filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, all briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as it Order the Recommended Order of the Trial Examiner, and orders that Respondent H. K. Porter Company, Inc., Disston Division-Danville Works, Danville, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. July 9, 1965.

JOHN H. FANNING, Member
GERALD A. BROWN, Member
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

May 19, 1966 Opinions and Order of Court of Appeals.

May 19, 1966 Opinions and Order of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,492

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner v.

NATIONAL LABOR RELATIONS BOARD, Resondent

No. 19,507

H. K. PORTER COMPANY, Inc., DISSTON DIVISION-DANVILLE WORKS, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petitions to Review, and Cross-Petition to Enforce, an Order of the National Labor Relations Board Decided May 19, 1966

Mr. Michael H. Gottesman, with whom Mr. Elliot Bredhoff was on the brief, for petitioner in No. 19,492.

Mr. Donald C. Winson, of the bar of the Supreme Court of Pennsylvania, pro hac vice, by special leave of court, with whom Messrs. Bartholomew A. Diggins, Daniel W. Sixbey and Paul R. Obert were on the brief, for petitioner in No. 19,507.

Mr. Elliott Moore, Attorney, National Labor Relations Board, with whom Messrs. Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Morton Namrow, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.

WRIGHT, Circuit Judge: These cases are before the court on petitions filed by both the union and the employer to review a final order of the National Labor Relations Board. The Board has filed a cross-petition to enforce its order requiring the company to bargain in good faith.

Pursuant to a secret ballot election, the union was certified on October 5, 1961, as the collective bargaining representative of all production employees at the employer's Danville, Virginia, plant. After four years of bargaining and two orders from the Board requiring the employer to cease and desist from refusing to bargain collectively with the union, the second of which included the provision that the employer also cease and desist from "interfering with, restraining or coercing employees in the exercise of their right to self-organization * * *." no agreement has been reached. It is the second order which is the subject of these proceedings, the first order having been summarily enforced on July 17, 1964. by the United States Court of Appeals for the Fourth Circuit after the company filed no exceptions to the trial examiner's findings or proposed order. See 61 STAT. 147 (1947), 29 U.S.C. § 160(c).

The narrow issue presented by the present proceeding, according to trial examiner, is "whether, as the General Counsel contends, [the employer's] position on the Union's demands for a check off was a mere device to frustrate agreement on a contract, or whether, as [the employer] contends, it was merely engaging in 'hard bargaining,' with no intention of preventing an agreement." The trial examiner concluded that the employer's refusal to grant a check-off was "for the purpose of frustrating agreement with the Union and hence [the employer had] engaged in bad-faith bargaining." The Board, through a three-member panel convened pursuant to Section 31 of the National Labor Relations Act, adopted the trial examiner's findings, conclusions, recommendations and proposed order.

The employer, citing Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), maintains that the trial examiner's finding that the company refused to agree to a dues check-off provision in order to frustrate an agreement is not supported by substantial evidence on the record considered as a whole. It argues, that, while Section $8(d)^2$ of the Act requires good faith bargaining, it does not compel either party to agree to a proposal or require the making of a concession. Our study of the record, however, convinces us that the Board's findings are supported by substantial evidence on the record considered as a whole, and that the company's adamant refusal to consider a union dues check-off for those employees who individually requested it did indeed frustrate the bargaining.

In the prior proceeding, in which the Board likewise found violations of Sections 8(a) (5)³ and (1)⁴ of the Act, in addition to making unilateral changes in working conditions which it had refused to grant the union, the company had also refused to agree to an arbitration provision while insisting on a no-strike clause. This insistence, the Board found, demonstrated bad faith bargaining on the part of the company contrary to the observation in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957), that "* * the agreement to arbitrate grievance disputes in the quid pro quo for an agreement not to strike."

In spite of the Board's order in the prior proceeding, it was not until ten months and 20 bargaining sessions following its issuance that the company receded from the position which the Board had found to amount to an unfair labor practice. When bargaining was resumed after the Board's prior order, some 14 items were open and unresolved. At the time of the final meeting on

^{1. 73} STAT. 542 (1959), 29 U.S.C. § 153(b).

^{2. 61} STAT. 142 (1947), 29 U.S.C. § 158(d).

^{3. 61} STAT. 141 (1947), 29 U.S.C. § 158(a) (5).

^{4. 61} STAT. 140 (1947), 29 U.S.C. § 158(a) (1).

Sections 8(a) (1) and (5) of the Act read:

[&]quot;(a) It shall be an unfair labor practice for an employer —

⁽¹⁾ to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

⁽⁵⁾ to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

September 10, 1964, only three items remained unresolved, the union having given in on all of the others.⁵

Throughout the negotiations, both before the prior order and subsequent to it, the union had insisted on a dues check-off. The union maintains no office in Danville, that area being serviced from Roanoke, Virginia, a distance of about 85 miles. Moreover, the 300 company employees live within a radius of from 35 to 40 miles from Danville. Thus without a check-off, or some adequate substitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation.

5. The representative of the union testified, without contradiction, as follows:

Q. When parties began meeting in October of 1963, how many items were there that the union was demanding; before they would agree to a contract?

A. Fourteen.

Q. Your testimony is that they are now demanding three?

A. Well, actually, it covers a number of things.
Q. What's happening to those issues that you didn't refer to in your testimony earlier?

A. In the hopes of getting an agreement, the union gradually held twenty meetings, and dropped all those demands except those I mentioned.

The examiner reported that subsequent to the Board's prior order "each of the parties withdrew certain of its bargaining proposals." With reference to the company's concessions, the examiner is apparently referring to the withdrawal of the company's no-strike clause demand without arbitration, which withdrawal was required by the Board's prior order.

^{6.} The check-off is included in 92 per cent of all contracts in manufacturing industries. See BNA, Collective Bargaining Negotiations and Contracts, p. 87:3. Most of the contracts not containing check-off provide some alternative method of dues collection on company property. *Id.* at p. 87:901.

The company admitted that it had no general policy against a dues check-off; that indeed in some of its divisions the bargaining agreements so provide. The company admitted, too that the refusal to check off union dues at the Danville plan was not based on inconvenience. As a matter of fact, the Danville plant was check-

 Q. Is there a company policy, that is a policy of H. K. Porter Company, against the check-off of union dues?

A. [By Witness T. C. Jones, chief negotiator for the company] We do have some contracts at some of our plants that do have check-off, I do know that.

Q. Is there, to your knowledge, a company policy against the check-off?

A. Being a company policy, not that I know of.

Q. Is there a company policy against the collection of union dues on company property?

A. Not any that I am aware of.

Q. So your position on these matters is not dictated by company policy?

A. That is correct.

8. Q. You have never taken the position, have you, that there was any inconvenience to the company in checking off union dues?

A. [By Witness Jones, chief negotiator] To the best of my knowledge, no, sir, we have not.

Q. In point of fact, there would be no more inconvenience, would it, than checking off Savings Bonds or insurance coverage or United Fund contributions, or any other item?

A. That's right.

Q. As I understand your testimony, I want to get this clear, your sole reason for rejecting the demand for a check-off or for dues collection in the plant was that this was union business?

A. Right; this was union business, and the union should collect their own business; yes, sir. And I should have nothing to do with it. ing off from the salaries of its employees for purchase of United States savings bonds, dependents' coverage under health insurance, United Fund, and a Good Neighbor Fund.⁹ The company's position, as stated by its counsel and by its chief negotiator, was simply that "our purpose in denying check-off was that we were not going to aid and comfort the union." ¹⁰

It is clear from the record in this case that the prior order of the Board, drawn, as is the order in suit here,

- 9. Q. I'll be right direct with you, Mr. Jones [chief negotiator], does your company, or has your company in the past made any deductions from payroll, other than those required by law?
 - A. Yes, sir.
 - Q. Would you name what the purpose was for which those deductions were made?
 - A. We deduct Treasury Bonds.
 - Q. United States Savings Bonds?
 - A. The United States Savings Bonds. We deduct dependents coverage on the insurance policy; we deduct—

Trial Examiner: That's health insurance?

The Witness: Yes, sir. And we deduct a United Fund and Good Neighbor Fund.

- 10. Q. [By counsel for the company] As I understand your testimony, the reason for refusing to grant check-off or collection of union dues, was that you were not going to aid and comfort the union, in the union business?
 - A. [By Witness Jones, chief negotiator] Yes, sir, that's right.

in terms of the statute,11 requiring the company to bargain in good faith, was ineffective. Instead of starting a new Section 10(b) 12 proceeding, the Board no doubt could have requested the Fourth Circuit to cite the com. pany for contempt for continuing failure to bargain in good faith. Certainly a succession of Section 10(b) proceedings resulting in Board orders cast in statutory language is not the answer where refusal to bargain persists. In order to eliminate further frustration of the purposes of the Act. 13 The union suggests that the Board should have included in its order a provision requiring the company to withdraw its objection to the dues check-off. Moreover, the union suggests that, since the company not only refused the check-off but also refused to allow the union to collect dues during non-working hours on non-working areas of the company premises,14 a further provision should be included in the Board's order protecting this statutory right as well.

^{11.} Section 8(a) (5), 29 U.S.C. \$ 158(a) (5).

^{12. 61} STAT. 146 (1947), 29 U.S.C. § 160(b).

^{13. 61} STAT. 143 (1947), 29 U.S.C. § 159. See also 61 STAT. 141 (1947), 29 U.S.C. § 141.

^{14.} Q. Mr. Jones [chief negotiator], you were in the room when Mr. Bloodworth testified, were you not?

A. Yes, sir.

Q. His testimony was that the subject was discussed, the subject of check-off was discussed at almost all of your meetings; and the company's consistent position has been that you will not check off union dues, is that correct?

A. That's correct.

Q. He also testified that the union ordered to withdraw his request for check-off, if the company

May 19, 1966 Opinions and Order of Court of Appeals.

It is true, as the company contends, that under Section 8(d) 15 it cannot be compelled to agree to a proposal or make a concession. But neither can refusal to make concessions be used "as a cloak * * * to conceal a purposeful strategy to make bargaining futile * * *."

N.L.R.B. v. Herman Sausage Co., 5 Cir., 275 F.2d 229,

were willing to agree to some kind of an arrangement, whereby the union could collect its dues in the plant, from employees during periods when they were not working?

A. That is correct.

Q. They made that offer?

A. Yes, sir.

Q. What was your position on that?

A. My position is and was then that that's union business.

Q. And therefore -

A. They could collect their own dues at their own meetings or at their offices.

Q. Your position that you would not permit this on the plant grounds?

A. Yes, sir.

Trial Examiner: What is your objection to a union official collecting it from employees at the lunch hour, or when coming to or leaving work?

The Witness: I just think that I should not help the union collect their dues, and this is what I am doing, when I let them collect it on company property, when they can go right to their union meetings that they hold here and collect the dues at the regular meetings they have in town.

15. Section 8(d), 29 U.S.C. § 158(d), reads in part: "For the purposes of this section 1, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reason232 (1960). "Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." N.L.R.B. v. Insurance Agents' Union, 361 U.S. 477, 485 (1960).

While it is clear from the record that the company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off,¹⁶ it is not necessary to include a specific reference to the check-

> able times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *."

16. Footnote 9 in the trial examiner's findings reads in part:

"This is not to say that the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled. " " ""

This footnote is inconsistent with the trial examiner's faith bargaining." To suggest that in further bargain-Union and hence [the company had] engaged in badwas "for the purpose of frustrating agreement with the finding that the Company's refusal to grant a check-off ing the company may refuse a check-off for some other off in the Board's order. 17 Nor, in the circumstances of this case is it necessary to provide in the order that the union shall have the right to collect dues during non-working hours on non-working areas of the company's premises. 18 In any contempt proceeding, the record made before the Board in both Section 10(b) proceedings will be available to this court. Thus we will be in a position to make a judgment based not only on the Board's order, but on the entire record of this company's performance at the bargaining table.

Affirmed and enforced.

WILBUR K. MILLER, Senior Circuit Judge, dissenting in No. 19,507: It is my view that the Labor Board's decision, here under review, is not supported by substantial evidence when the record is considered as a whole in the manner described and prescribed by Universal Camera Corp. v. Labor Board, 340 U.S. 474 (1951). Consequently, I cannot agree with my brothers of the majority when they say in their opinion:

reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute. Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded.

^{17.} Compare J. I. Case Co. v. N.L.R.B., 321 U.S. 332, 341 (1944); Burr v. N.L.R.B., 5 Cir., 321 F. 2d 612, 615 (1963).

^{18.} It would serve no useful purpose to have another § 10(b) proceeding to require the company to allow the union to collect dues during non-working hours on non-working areas of the company's premises. The issue was raised in these proceedings and the company offered no good reason for its flat refusal to allow the dues collection on its premises. Compare Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945); N.L.R.B. v. Walton Manufacturing Company, 5 Cir., 289 F.2d 177 (1961).

". . . Our study of the record, however, convinces us that the Board's findings are supported by substantial evidence on the record considered as a whole, and that the company's adamant refusal to consider a union dues check-off for those employees who individually requested it did indeed frustrate the bargaining."

The union was just as adamant in refusing to sign a contract which did not contain a checkoff clause or some other means of company aid in collecting union dues. Its representative informed the Company's negotiator of this firm purpose, and counsel for the Board's General Counsel (the charging party) told the examiner that his inquiry showed the union would not sign a contract without a checkoff. Thus, the union never intended to bargain on that issue; it simply stated it must have a dues collection provision or there would be no contract. In these circumstances, it is difficult for me to understand how it can be said that the Porter Company's position on the checkoff issue "did indeed frustrate the bargaining." Because of the union's attitude on the issue—its stated determination not to negotiate in good faith with respect to it-bargaining as to a checkoff provision was impossible from the beginning. Yet it is the Company, not the union, which has been found guilty of an unfair labor practice.

The examiner's decision, adopted by the Board, dwelt on the union's need for a checkoff which could be granted by the Company without inconvenience to itself. And the majority opinion notes the union's consistent insistence on a dues checkoff and attempts to justify it by saying:

"... The union maintains no office in Danville, that area being serviced from Roanoke, Virginia, a distance of about 85 miles. Moreover, the 300 company employees live within a radius of from 35 to 40 miles from Danville. Thus without a check-off, or some adequate substitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation."

But the record shows the union has a mailing address at the home of a member in Danville. Members could mail their dues to that address or to the office in Roanoke, or dues could be collected at the monthly union meetings. Moreover, it was shown that the union has a potential income of \$1,500 per month from the Danville members, which would seem to justify the establishment of a small office in that town where dues could be paid. Thus there was no real necessity for the union's unalterable insistence on a checkoff clause.

Nevertheless, the examiner said in his decision:1

"... I find and conclude that with respect to the issue of checkoff, Respondent [the Company] bargained with the Union from October 23, 1963, through September 10, 1964, in bad faith and thereby violated Section 8(a) (5) and (1) of the Act."

^{1.} Without discussion or comment, a three-member panel of the Board adopted the examiner's findings, conclusions and recommendation. So we must turn to the latter's decision to ascertain the findings and conclusions which the Board adopted as its own.

He also stated:

"... My careful consideration of the entire record convinces me that Plant Manager Jones, Respondent's chief negotiator, took the position he did with respect to the checkoff issue, for the purpose of frustrating agreement with the Union, and hence engaged in bad-faith bargaining ..."

He said he based the foregoing conclusion upon three "factors," which I here reproduce, largely in his own words:

- 1. That the demeanor of T. C. Jones, the Company's negotiator, while testifying in the present proceeding, "convinced me that his attitude toward collective bargaining had not changed since he testified in the prior case." 2
- 2. "Jones' explanation for [sic] his refusal to agree to any of the Union's suggestions for the collection of its dues, namely, that he did not wish to give aid and comfort to the Union by assisting it in collecting dues, if not actually a false reason, evidences an attitude inconsistent with the obligation imposed upon an employer by the Act." This reason for refusing to agree to a checkoff tended, the examiner said, to disparage or discredit the union in the eyes of the employees.
- 3. "In the instant case Respondent seeks to explain away the fact that at other plants it has contracts with unions which provide for a checkoff, by arguing, in substance, that those provisions

^{2.} The "prior case" is discussed later in this dissent.

were brought about by reason of the economic strength of the union there involved, and urges that the Union's remedy in this case was to call a strike rather than prosecute an unfair labor practice charge. Not only does such a position by an employer run counter to the objectives of the Act which Congress set forth in its statement of 'Findings and Policies' (see Section 1 of the Act) but it also demonstrates that Respondent's purpose was to forestall reaching an agreement with the Union by the expedient of disparaging the latter in the eyes of the employees. Cf. Sunbeam Plastic Corporation, 144 NLRB 1010. This would seem to be practicularly true in view of Respondent's admission that checking off union dues would impose no burden upon it, and its admitted checkoff for Government Bond and United Givers Fund, neither of which seem particularly necessary for the promotion of Respondent's business."

Thus, it is apparent the examiner base his conclusion that the Company had bargained in bad faith upon three "factors," none of which rises to the level of proof:
(a) that Jones's demeanor showed antiunion animus, and (b) that two of the positions taken by the Company during bargaining tended to disparage or discredit the union in the eyes of the employees. Nothing else in the record was pointed out by the examiner as supporting his conclusion, and I have discovered nothing which in the slightest degree supports it. His conclusion, then, stands or falls on the validity of the antiunion animus and union disparagement "factors" which he expressly set forth.

Antiunion animus on the part of an employer, even if shown by the record, is not an unfair labor practice. Metal Processors' Union v. N.L.R.B., 119 U.S. App. D. C. 78, 81, 337 F. (2d) 114, 117 (1964). For that reason, the first of the three "factors" upon which the examiner relied to support his conclusion of bad-faith bargaining falls of its own weight, even if the examiner's holding of Jones's alleged antiunion animus had been borne out by the record. But here the examiner did not purport to base his finding of antiunion animus on any evidence in the record, but merely on his own statement that "Jones' demeanor while testifying in the immediate proceeding convinced me that his attitude toward collective bargaining had not changed since he testified in the prior case."

The "prior case" to which the examiner referred arose from a complaint charging the Porter Company with bad-faith bargaining because, after 28 bargaining sessions between November 3, 1961, and November 27, 1962, the parties had not reached an agreement. The recommended order of the examiner in the prior case, issued with his decision on September 20, 1963, required the Company, upon request, to bargain with the union. Without waiting for the Board's decision,3 the Company began almost immediately to bargain with the union as ordered by the examiner in the prior case. The parties met in 21 bargaining sessions, beginning October 23, 1963, and ending September 10, 1964. These meetings, the subject of the present proceeding, were fruitful. Of the 14 issues which were open and unresolved when the meetings began October 23, 1963, 11

^{3.} Which for some reason not stated was not issued until April 15, 1964.

were resolved by the process of bargaining, so that only three remained unresolved at the adjournment of the final session on September 10, 1964. These were wages, health and life insurance, and checkoff.

The examiner in the earlier case did not find that Jones had antiunion animus; the present examiner decided that for himself from a reading of the prior examiner's dicision, and then concluded that Jones's demeanor in the present proceeding showed he still had that animus. The present examiner said in this connection:

"I fully recognize that because an employer engaged in bad-faith bargaining in one set of negotiations, it does not necessarily follow that the employer's subsequent bargaining negotiations were conducted in bad faith. I merely hold that an employer's bad-faith bargaining in the prior negotiations is a factor to be considered, along with the other circumstances of the case, in determining whether his subsequent bargaining was in good faith."

Although the examiner found that, with respect to the checkoff issue the Company bargained with the union in bad faith and ordered resumption of bargaining, he expressly disclaimed any intention to require the Company to agree to aid in the collection of dues. Footnote 9 to the examiner's decision contains the following:

"This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of checkoff. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining, the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled . . ."

Thus the examiner gave lip service to Section 8(d) of the Act, 29 U. S. C. § 158 (d), which is in part as follows:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." (Emphasis supplied.)

But his decision that, by not agreeing to a dues collection provision, which he thought the union badly needed and which would cause it no inconvenience, the Company had not bargained in good faith, left no room for doubt that what he termed good-faith bargaining would require the Company to yield on the checkoff issue. This is, of course, contrary to the express provision of the statute quoted above.

This leaves for consideration the other two "factors" upon which the examiner based his conclusion of badfaith bargaining on the part of the Company. First, as he put it,

"Jones' explanation for his refusal to agree to any of the Union's suggestions for the collection of its dues, namely, that he did not wish to give aid and comfort to the Union by assisting it in collecting dues, if not actually a false reason, evidences an attitude inconsistent with the obligation imposed upon an employer by the Act. The very act of bargaining with a union, thus granting it recognition as the representative of the employees, in and of itself gives aid, comfort, assistance and prestige to that Union. But the policies of the Act, and the basic principles upon which it rests, require an employer to give this kind of 'aid and comfort' to the designated representatives of its employees. For, as the Board had held in a somewhat comparable situation, it is inconsistent with the bargaining obligation which the Act imposes upon an employer for the latter to conduct negotiations with the statutory representative in such a manner as to disparage or discredit the statutory representative in the eyes of its employee constituents. General Electric Company, 150 NLRB No. 36."

The second "factor" was another statement of the Company, to which I have heretofore referred. The examiner said it showed the emloyer's purpose "was to forestall reaching an agreement with the Union by the expedient of disparaging the latter in the eyes of the employees."

The examiner was indeed hard put to it when he concocted these two "factors" as bases for his conclusion. He confused the union with its members and eroneously thought an employer is somehow required to avoid any act which may disparage or discredit a union in the eyes of the employees. The Act is for the benefit of employees and not unions and, as Mr. Justice Rut-

ledge said, "Nothing in the act requires an employer to maintain a union's prestige . . ."4

Additionally, I pointed out that the examiner did not expressly find that the Company said or did anything which actually disparaged or discredited the union; he merely said disparaging or discrediting a union is inconsistent with an employer's duty under the Act. As Mr. Justice Rutledge said, 326 U. S. at 399, "Something more than mere supposition should underlie a conclusion which supports a finding of unfair practice,"

The fact that the examiner's three "factors" fall so far short of supporting his conclusion of bad-faith bargaining on the part of the Company, and the further fact that the record considered as a whole is devoid of support for his conclusion, lead me to think the examiner was actuated by antimanagement animus. The three-member panel of the Board which rubber-stamped the examiner's decision either did so without examining the record or, I suggest, shared his antimanagement animus.

Before concluding I call attention to the following statement in the majority opinion:

"... When bargaining was resumed after the Board's prior order, some 14 items were open and unresolved. At the time of the final meeting on September 10, 1964, only three items remained unresolved, the union having given in on all of the others." (Emphasis supplied.)

⁴Concurring in part in May Stores Co v. Labor Board, 326 U. S. 376, 398 (1945).

May 19, 1966 Opinions and Order of Court of Appeals.

The italicized clause is erroneous. Even the examiner did not go so far; on this subject, his decision said:

"... During the negotiations which followed, each of the parties withdrew certain of its bargaining proposals, so that upon adjournment of the final meeting on September 10, only 3 items remained unresolved. These were wages, health and life insurance, and checkoff..."

I have heretofore quoted a portion of the examiners footnote 9 to show that even he realized he could not order the Company to agree to a checkoff because Section 8(d) of the Act provides that the mutual obligation of an employer and a union to confer in good faith.

"... does not compel either party to agree to a proposal or require the making of a concession...."
With respect to this the majority opinion says in footnote 16:

"Footnote 9 in the trial examiner's findings reads in part:

"'This is not say that in the resumed bargaining sessions which I shall recommend, Respondent will be reqired to agree to some form of check off I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled " " ""

This footnote is inconsistent with the trial examiner's finding that the company's refusal to grant a check-off was 'for the purpose of frustrating agree-

ment with the Union and hence [the company had] engaged in bad-faith bargaining.' To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute. Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded."

Thus, in holding the examiner's footnote 9 should be disregarded, the majority hold in effect that Section 8(d) of the Act should be disregarded, and that the Company should be held in contempt if, on remand, it does not agree to a contractual provision for some sort of Company aid in the collection of union dues.

I have seldom seen a record so barren of support for the decision of the examiner and the Board, and I earnestly dissent from the majority opinion which upholds that decision.

I concur in the affirmance of No. 19,492.

May 19, 1966 Opinions and Order of Court of Appeals.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner,

V.

NATIONAL LABOR RELATIONS
BOARD RESPONDENT.

V.

H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE Works, Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD, Respondent. No. 19,492 September Term, 1965 No. 19,507

On Petitions to Review, and Cross-Petition to Enforce, an Order of the National Labor Relations Board.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.

ORDER

These cases came on to be heard on the record from the National Labor Relations Board and on petitions to review, and cross-petition for enforcement of, the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and DE-CREED by this court that the order of the National Labor 80 May 19, 1966 Opinions and Orde_r of Court of Appeals.

Relations Board on review in these cases is affirmed, and that it shall be enforced.

Pursuant to Rule 38 () the respondent shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

per Circuit Judge Wright

Dated: May 19, 1966

Separate opinion by Senior Circuit Judge Wilbur K. Miller dissenting in No. 19,507, and concurring in affirmance of No. 19,492.

Motion to Clarify.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,492

UNITED STEELWORKERS OF Petitioner AMERICA, AFL-CIO,

v.

NATIONAL LABOR RELA Respondent TIONS BOARD,

No. 19,507

H. K. PORTER COMPANY, INC.,
DISSTON DIVISION-DANVALLE WORKS,

v.

NATIONAL LABOR RELA Respondent TIONS BOARD,

Motion of United Steelworkers of America, AFL-CIO, to Clarify an Earlier Decree of This Court in the Above-Captioned Proceeding

United Steelworkers of America, AFL-CIO, hereinafter "the Steelworkers" or "the Union," request that this Court clarify its earlier decree issued in the above-captioned proceeding and advise the parties that the terms of such decree require that the Company agree to the Union's request for a contractual dues checkoff provision. In support of its Motion, the Union shows as follows:

1. The Opinion of this Court

- a) On May 19, 1966, this Court (per Bazelon, C. J. and Wright, J. Miller, J. dissenting) issued its decision (.... U.S. App. D.C., 363 F. 2d 272), affirming and enforcing an order of the National Labor Relations Board (153 NLRB No. 119) finding that H. K. Porter Company, hereinafter "the Company," had violated Section 8 (a) (5) and (1) of the National Labor Relations Act as amended, 29 U. S. C. 158 (a) (1) and (5).
- b) In essence, as reflected clearly throughout its comprehensive opinion, the Court held that the Company failed to bargain in good faith in that it refused to agree to the Union's request for a dues checkoff provision in the contract being negotiated for "no reason, other than to frustrate the bargaining procedure "The Court found that at the Company's Danville plant, monies were checked off from the salaries of employees for the purchase of U.S. savings bonds, dependants' coverage under health insurance, United Fund and a Good Neighbor Fund. The Court found that the Company's admitted position with respect to the Union's request for dues checkoff was simply that its "purpose in deny-

ing checkoff was that we were not going to aid and comfort the Union." (supra, 363 F. 2d at 275). This, the Court held, was not a valid basis under the statute for refusing the Union's request. Significantly, the Court further observed that the Company was foreclosed from raising in any subsequent negotiations any other reasons, not heretofore advanced, as a basis for refusing a checkoff provision. At footnote 16 of its opinion, the Court observed (id at 276):

Footnote 9 in the trial examiner's findings reads in part: "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled " ""

This footnote is inconsistent with the trial examiner's finding that the company's refusal to grant a checkoff was "for the purpose of frustrating agreement with the Union and hence [the company had] engaged in bad-faith bargaining."

To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute. Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded." (Emphasis added).

2. Subsequent Events

- a) Subsequent to the issuance of the Court's opinion, the Company filed a petition for certiorari. Pending the Supreme Court's decision whether to grant certiorari, the Company filed a motion in this Court to stay the decree. In response to the Union's opposition to any such stay, the Company on June 21, 1966 replied, in part, that "the effect of the opinion and order of the Court is to require the Company to agree to a dues checkoff provision. This, the Company contends, would be most unfair" On October 10, 1966, the Supreme Court denied the Company's petition for certiorari (385 U.S. 851).
- b) Thereafter, by letter dated October 12, 1966, the Union requested that a meeting be held with the Company to implement the decree of this Court by agreeing upon a dues checkoff provision. (See Exhibit A attached hereto). Pursuant to this request, a meeting was attended by representatives of both parties on Thursday afternoon, October 27, at the Hotel Danville in Danville, Virginia.
- c) Shortly after the meeting convened, a dispute arose as to the meaning of this Court's decision. As explained by plant manager Carl Vischer, the Company interpreted the decision as meaning that it was not obligated to agree to a dues check-off provision in the contract, but rather that it was obligated only to provide some form of assistance to the Union with respect to the collection of dues. The Union's representative, on the other hand, advised the Company that it interpreted the decision to require the Company to agree to a check-off provision. In reliance particularly upon footnote 16

of the decision, the Union took the position that the Company had to agree to a checkoff because it was now foreclosed from attempting to raise any further reasons, not heretofore advanced, upon which it could base any objection to a contractual dues checkoff provision.

3. The Nature of the Controversy; the Need for Clarification

a) In view of the disagreement between the parties over the legal interpretation of the Court decision, the bargaining session adjourned. The Company thereafter by letter dated November 3, 1966 advised the Union, in part, as follows: (See Exhibit B attached hereto):

"At the meeting held here on October 27 between the representatives of the Company and the Union, you stated that under the Union's interpretation of the recent Court of Appeals decision, the Company was obligated to agree to a dues checkoff provision; that is, the collection of Union dues by the Company through payroll deductions . . . It is our position that the court order requires us to bargain with the Union in good faith in an attempt to establish a system of dues collection at the plant

^{1.} Curiously enough, the only objection to a contractual dues checkoff provision voiced by the Company at this meeting was that this was "Union business." As the Union's representative pointed out to the Company, this was the precise reason which the Company had previously given in attempting to justify its refusal to grant a contractual dues checkoff provision and which the trial examiner, the Board and ultimately this Court, rejected as not constituting a valid basis for denying the Union's request.

which is acceptable to both the Company and the Union. The Company will not be coerced into making an outright gift of a dues checkoff provision simply because the Union thinks the court has ordered us to do so."

- b) In sum, it seems self-evident that the lone disagreement here relates to the question whether this Court's decree required the Company to incorporate a dues checkoff provision in the contract. It is our understanding that all other matters have been resolved. A contract has been entered into effective December 1, 1966 covering all terms and conditions of employment (see Exhibits C and D attached hereto), except the question of dues checkoff; the parties have agreed that that question was to be resolved in accordance with the terms of the Court's decree but, as mentioned above, that problem remains unresolved to date precisely because of the disagreement over the interpretation to be placed upon that decree. This disagreement, in turn, raises only a legal issue.
- c) In such circumstances, the Union has elected initially to file the instant motion to clarify rather than to request the Board to commence contempt action against the Company. Our reasons for doing so are two: first, it is our understanding that there are no material issues of fact in dispute which would require resort to the more time-consuming contempt litigation route; and, second, we anticipate that if the instant motion is granted and the Court clarifies its decree, the Company would undoubtedly comply with such interpretation and thus eliminate the need for any contempt proceeding.

4. The Clarification of the Decree

We submit that a reasoned interpretation of the Court's decree requires that the Company agree to the Union's request for a contractual dues checkoff provision. Indeed, as mentioned above, the Company itself acknowledged this lact in its earlier motion for a stay. Equally important, the notion that this Company could subsequently raise a valid objection to a contractual dues checkoff provision was firmly laid to rest by this Court at footnote 16 of its opinion. There, the Court expressly rejected the Trial Examiner's reasoning that the Company was not required to agree to a dues checkoff provision in subsequent negotiations. As the Court properly observed (id at 276): [t]o suggest that in further bargaining the Company may refuse a checkoff for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute"

Motion to Clarify.

WHEREFORE, the Steelworkers respectfully request that its motion to clarify be granted and that the Court advise the parties that the terms of its prior decree require that the Company agree to the Union's request for a contractual dues checkoff provision.

Bredhoff & Gottesman by Elliot Bredhoff,

Michael H. Gottesman
George H. Cohen
1001 Connecticut Ave., N.W.
Washington, D.C.
Attorneys for United Steelworkers
of America, AFL-CIO, the movant
herein.

(Dated February 24, 1967)

(Certificate of Service omitted in printing)

Exhibit "A"

October 12, 1966

Mr. C. V. Vischer, Plant Manager H. K. Porter Co., Inc. P. O. Box 3000 Danville, Virginia 24541

Dear Mr. Vischer:

On October 10, 1966 entered an order on case Re: H. K. Porter Company Inc., v. NLRB.

Therefore the Union is demanding the Company to provide the check-off in the contract that was agreed upon as of date October 1, 1966 and that date must be included in the copies sent to me by Mr. Wilson.

Very truly yours,

Ted Jennings Sub-District Director

TJ: il

cc: M. C. Weston

Michael Gottesman

Motion to Clarify.

Exhibit "B"

November 3, 1966

Mr. Ted Jennings
United Steel Workers of America
2823 Williamson Road N. E.
Box 5544
Roanoke, Virginia

Dear Mr. Jennings:

At the meeting held here on October 27th between representatives of the Company and the Union you stated that under the Union's interpretation of the recent Court of Appeal's decision the Company was obligated to agree to a dues check-off provision; that is, the collection of Union dues by the Company through payroll deductions. You stated that the Union would not discuss any program for dues collection other than dues check-off.

It is our position that the court order requires us to bargain with the Union in good faith in an attempt to establish a system of dues collection at the plant which is acceptable to both the Company and the Union. The Company will not be coerced into making an outright gift of a dues check-off provision simply because the Union thinks that the court has ordered us to do so. This, in our view, is not bargaining.

We are more than willing to discuss with you any reasonable program for the collection of Union dues from our employees which is convenient, effective, and satisfactory to both the Union and the Company, and to explore all avenues for reaching agreement on such a program. We do not think, however, that discussions between us can be limited only to the subject of dues check-off.

We earnestly request a meeting at the earliest possible date for this purpose.

Very truly yours,

Carl V. Vischer Plant Manager

CVV/tj

cc: J. W. Puth

T. P. Luscher

G. Cohen

Motion to Clarify.

Exhibit "C"

December 15, 1966

Mr. Ted Jennings United Steelworkers of America 2823 Williamson Rd. N. E. Box 5544 Roanoke, Virginia

Dear Mr. Jennings:

Confirming our phone conversation this morning, we have received the signed copy of the contract, and note that the effective date is back-dated to October 1, 1966.

Since we were still negotiating on a contract October 27th here in Danville, and corresponding with you in November on the subject, we request that the effective date be changed to December 1, 1966, which would be the approximate date of signing by the officials of the United Steelworkers.

We hope that this request meets with your approval.

Very truly yours,

Carl V. Vischer Plant Manager

CVV/jt

cc: W. E. Wilson

Motion to Clarify.

Exhibit "D"

January 24, 1967

Mr. Carl V. Vischer, Plant Manager H. K. Porter Company

P. O. Box 3000

Danville, Virginia

Dear Mr. Vischer:

Due to changes made in contract and to correspondence. The Union agrees to date of December 1, 1966 as date on contract between H. K. Porter Company and United Steelworkers of America AFL-CIO.

Yours truly,

Ted Jennings Sub-District Director

TJ:il

cc: M. C. Weston

Opposition to Motion to Clarify.

Opposition to Motion to Clarify.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD, Respondent.

H. K. PORTER COMPANY, INC., DISSTON DIVISION — DANVILLE WORKS, Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD, Respondent. No. 19,492

No. 19,507

Opposition of H. K. Porter Company, Inc. to Motion of United Steelworkers of America to Clarify an Earlier Decree of This Court

H. K. Porter Company, Inc., the Petitioner in the above-captioned Case No. 19,507, hereby opposes the Motion filed by United Steelworkers of America in which the Union requests that this Court clarify its earlier decree issued in the above-captioned cases and advise the parties that the terms of such decree require the Company to agree to the Union's demand for a contractual dues check-off provision. In support of its opposition to the Union's Motion, the Company states as follows:

 The Motion Is Not Timely Filed And Is Not Procedurally Proper.

On May 19, 1966, this Court filed its Order in the above-captioned cases, affirming the Order of the National Labor Relations Board which was on review in these cases. Now, over nine months later, the Union requests that this Court clarify its Order. Although this Court does not have any procedural rules specifically governing motions for clarification, it certainly would appear that a period of over nine months constitutes an unreasonable delay in asking any federal court of appeals to clarify an order. If Rule 59(e) of the Federal Rules of Civil Procedure is applicable to the Union's Motion, that Rule specifically requires that a motion to alter or amend a judgment shall be served not later than ten days after entry of the judgment. The ten-day requirement as contained in Rule 59(e) serves to emphasize the gross untimeliness of the Union's Motion.

In its Motion For Leave to File Out of Time, the Union states that it is "self-evident from reading said Motion to Clarify why it could not have been filed within ten days of the Court's decree." We fail to see the so-called "self evident" reason. If the Union means that it did not know at that time that the Company disagreed with its interpretation of the Order, we point out that the Union knew on May 19, 1966 that this Court had refused the Union's request that a provision be included in the Order requiring the Company to agree to a dues check-off provision. Furthermore, as admitted by it in the Motion, the Union was aware of the Company's interpretation of the Order at least as early as November 3, 1966.

In the prayer for relief in its Motion, the Union asks this Court to "require that the Company agree to the Union's request for a contractual dues checkoff provision." This is precisely the relief which the Union sought from this Court in the above-captioned Case No. 19,492. The Board had denied this relief to the Union

and this Court, by affirming the Board's Order, likewise denied this relief to the Union. The effect of all this is that the Union is not asking merely for clarification of the earlier Order, but is asking that the earlier Order be amended or altered so as to give the Union the exact relief which the Board and this Court denied to it over nine months ago. As noted above, Federal Rule 59 (e) requires that a motion to alter or amend a judgment be served not later than ten days after entry of the judgment. Also, this Court's own Rule 26 provides that petitions for rehearing must be filed "within 15 days after judgment or decision."

The Actual Order Entered By This Court Is Clear and Unambiguous.

The Order entered by this Court on May 19, 1966 in the above-captioned cases expressly stated "that the Order of the National Labor Relations Board on review in these cases is affirmed, and that it shall be enforced."

In the Order of the National Labor Relations Board which was so affirmed by this Court, the Board expressly stated that it "adopts as its Order the Recommended Order of the Trial Examiner."

The Recommended Order of the Trial Examiner, as so adopted by the National Labor Relations Board and as so affirmed by this Court, expressly ordered the Company to "cease and desist from refusing to bargain collectively" with the Union and "upon request bargain collectively" with the Union.

Thus, there is no need for clarification of this Court's Order. It is clear and unambiguous in ordering

the Company to bargain collectively with the Union, upon request.

3. The Interpretation of This Court's Order Requested By The Union Is Contrary To Law.

The Union in its Motion is asking the Court to order the Company to agree to a dues check-off provision in the collective bargaining agreement. Such an order would be directly contrary to the express mandates of both the Congress and the United States Supreme Court.

Section 8 (d) of the National Labor Relations Act expressly states that good faith bargaining "does not compel either party to agree to a proposal or require the making of a concession."

In NLRB v. American National Ins. Co., 343 U.S. 395, 404 (1952), the Supreme Court said:

"And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

It is clear, therefore, that the relief sought by the Union in its present Motion is precluded by law.

Opposition to Motion to Clarify.

WHEREFORE, H. K. Porter Company, Inc. requests that the Union's Motion for Clarification be denied.

Respectfully submitted,

DANIEL W. SIXBEY
DIGGINS & O'BOYLE
1010 Vermont Avenue, N.W.
Washington, D. C. 20005
Attorneys for
H. K. Porter Company, Inc.

Of Counsel:

PAUL R. OBERT, Esq. 1500 Porter Building Pittsburgh, Pennsylvania

DONALD C. WINSON, ESQ.
WM. ALVAH STEWART, ESQ.
ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219

(Dated March 3, 1967)

(Certificate of Service omitted in printing)

Reply to Opposition.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STEELWORKERS OF AMERICA. AFL-CIO.

Petitioner.

NATIONAL LABOR RELATIONS BOARD,

Respondent

H. K. PORTER COMPANY, INC., DISSTON DIVISION - DANVILLE WORKS. Petitioner.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 19,492

No. 19.507

Reply to Opposition of H. K. Porter Company, Inc. to Motion of United Steelworkers of America to clarify an Earlier Decree of This Court

United Steelworkers of America, AFL-CIO, hereinafter 'the Union', replies to the opposition submitted by H. K. Porter Company, Inc. (hereinafter 'the Company') to its motion to clarify as follows:

Contrary to the position of the Company, the Union's instant motion is neither a request for rehearing nor a motion to alter a decree of this Court. Rather, the touchstone of the Union's motion is a request that the Court clarify its earlier decree because of events which occurred subsequent to the decree. In these circumstances, the time limits set forth in Rule 59 (e) of the Federal Rules of Civil Procedure and/or Rule 26 of this Court, upon which the Company relies in contending

that the Union's motion is untimely, are clearly inapplicable.

As the Company's own memorandum acknowledges impliedly (at page 3), the Union was not apprised of the Company's interpretation of this Court's decree of May 19, 1966 prior to November, 1966. Until that time that is, until the Company advised the Union that it did not construe the decree as requiring it to agree to the Union's request for a contractual dues checkoff provision — it was not even clear that a dispute existed as to what the Court decree meant. Indeed, the Union had good reason to believe that the Company interpreted the decree as requiring that it agree to a dues checkoff provision: for this is precisely what the Company advised this Court that the decree meant. See the Company's June 21, 1966 response to the Union's opposition to its request for a stay of this Court's decree. Plainly, therefore, it was not until five months had elapsed from the date of the decree of this Court that the instant dispute became evident. In such circumstances, it is untenable even to suggest that the ten-day time limit set forth in Rule 59 (e) could be apposite here. The simple fact is that there is no statute of limitations for filing the instant motion, just as there is no such limitation for bringing a contempt action.

2. The Company next contends that the order entered by this Court is clear and unambiguous. That order, the Company claims, was merely an affirmance of the Board order which, in turn, adopted the Trial Examiner's Recommended Order. It is well settled, however, that a Court order takes its meaning in large part from the entire decision of the Court which gave rise to such order. And here, it is the Union's contention that

the entire decision of this Court, and most particularly footnote 16 therein (see the Union's original motion). persuasively establishes that in the instant circumstances the Company could not have satisfied its duty to bargain in good fatih subsequent to the Court order. unless it agreed to a contractual dues checkoff provision. The Company now purports to disagree with this interpretation, although, as indicated above, it has previously agreed with this interpretation. This, then, is precisely the matter which the Union seeks to have clarified in the instant motion. In these circumstances, we submit that the Company's superficial assertion (page 5) that the Court merely ordered the Company "to bargain collectively with the Union upon request" and that therefore this order is "clear and unambiguous," is disingenuous.

Wherefore, the United Steelworkers of America, AFL-CIO, requests that its motion for clarification be entertained and the Court clarify its earlier decree as requested by the Union.

Respectfully submitted,
ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
GEORGE H. COHEN
Attorneys for the Movant,
United Steelworkers of America,
AFL-CIO.

(Dated March 8, 1967)

(Certificate of Service omitted in printing)

Motion for Reconsideration.

Motion for Reconsideration.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,492

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner

V.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 19,507

H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE WORKS, Petitioner

V.

NATIONAL LABOR RELATIONS BOARD, Respondent

Motion of United Steelworkers of America, AFL-CIO, Requesting the Court to Reconsider an Earlier Motion to Clarify the Decree Entered in the Above-Captioned Proceedings.

This is the most recent in a comprehensive series of legal steps initiated by the United Steelworkers of America, AFL-CIO (hereinafter "the Union") in what has been to date a singularly unsuccessful effort to compel the National Labor Relations Board to interpret correctly the decision and order entered by this Court in the above-captioned proceeding. That decision is re-

ported at U.S. App. D.C., 363 F.2d 272 (May 19, 1966).

Rather than to repeat all of the relevant facts which underlie our position here, we shall merely refer the Court to our initial motion to clarify that decree. The motion is self-explanatory. Essentially, it recites that the Court (per Bazelon, C.J. and Wright, J.: Miller. J. dissenting) held that the Company failed to bargain in good faith when it refused to agree to the Union's request for a dues checkoff provision in the contract negotiations for "no reason, other than to frustrate the bargaining procedure. . . ." The Court found that at the Company's Danville plant, monies were checked off by the Company from the salaries of employees for the purchase of U. S. savings bonds, dependents' coverage under health insurance, United Fund and a Good Neighbor Fund. The Court also found that the Company's "purpose in denying checkoff was that we were not going to aid and comfort the Union*. (supra. 363 F.2d at 275). This, the Court held, was not a valid basis under the statute for refusing the Union's request.

Significantly, the Court further observed that the Company was foreclosed from raising in any subsequent negotiations any other reasons, not heretofore advanced, as a basis for refusing a checkoff provision. At footnote 16 of its opinion, the Court observed (id at 276):

"Footnote 9 in the trial examiner's findings reads in part: "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled * * *'

This footnote is inconsistent with the trial examiner's finding that the Company's refusal to grant a check-off was "for the purpose of frustrating agreement with the Union and hence [the company had] engaged in bad-faith bargaining." To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute. Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded." (Emphasis added).

Based on the foregoing rationale the Union interpreted the Court opinion to mean precisely what it said — namely, that in subsequent negotiations the Company could not in good faith refuse a contractual checkoff provision. But in the post-decree negotiations, the Company urged a completely contrary interpretation of the decree of this Court. Thus, it was the Company's position that the decree merely meant that it was obligated to bargain anew concerning some form of dues collection assistance to the Union. To this end, the Company proposed discussions concerning the possibility of making available a table in the payroll office which could be utilized for the collection of dues.

The Union, on the other hand, asserted that the opinion of this Court expressly recognized (id. at 276) that employees had a statutory right to collect dues in non-working areas of the plant during non-working hours, separate and apart from the requirement that

in the circumstances here the Company was also obliged to agree to a contractual dues checkoff provision. In other words, the Union interpreted the Court decree as entitling it to both channels of dues collection, whereas the Company construed the decree as requiring it only to negotiate about making the former channel available to the Union.

Precisely because the thrust of this dispute in our view centered upon these two competing legal interpretations of the Court decree, the Union initially filed (on February 28, 1967) a Motion to Clarify that decree. The Court denied the motion; significantly, however, in so doing, it issued an invitation to the Board to test the mentioned competing interpretations of the decree through the agency's contempt procedure. The order of the Court was entered on March 22, 1967.

Thereafter, by letter dated April 3, 1967, the Union requested that the Regional Director initiate contempt proceedings consistent with the Court order. The Board, however, has seen fit not to do so. Instead, by letter dated June 22, 1967, (attached hereto as Exhibit B) the Union was merely apprised by the Board, as follows:

The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisions of the Order, the case is hereby closed. Please note that the closing is conditioned upon continued observance of said Order

^{1.} Attached hereto as Exhibit A is a copy of the Union's letter setting forth the Court order in full.

and does not preclude further proceedings should subsequent violations occur.

It is thus apparent that the Board, in disagreement with the legal position of the Union, has accepted the Company's interpretation of the Court order as requiring only that it now bargain with the Union concerning some form of dues collection assistance. Both parties furnished the agency with a statement as to their post-decree negotiations; there is not now nor has there ever been any factual dispute as to what transpired in said negotiations. The Board's mentioned latter ostensibly closing this case is silent — and quite properly so—as to any resolution of disputed factual issues. In such circumstances, then, there can be no question but that the Board closed the case plainly and simply because it construed the Court decree consistent with the legal position maintained by the Company.

Nor, we submit, is this surprising. Throughout the unfair labor practice proceedings, the Board consistently adhered to the position that its decision did not mean that the Company was required to agree to a checkoff provision in the resumed bargaining which it ordered. See footnote 9 of the Trial Examiner's decision quoted above at p. 2, which the Board affirmed. Significantly, this position was one of the main bases upon which the Union sought review in this Court. The Union's opening trief dated February 23, 1966, (pp. 16-17) emphasized that the above aspect of the Board's order was totally inconsistent with the remainder of its opinion which found the Company had refused the Union's demand for a dues checkoff provision "to frustrate agreement with the Union." Because of this fatal inconsistency the Union

urged that the Company could remedy its unfair labor practice only if it was ordered by the Board to withdraw its resistance to the Union's proposal.

The Court held (id. at 276) that "[w] hile it is clear from the record that the Company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues checkoff, it is not necessary to include a specific reference to the check-off in the Board's order." Implicit in this statement was the Court's recognition that a subsequent refusal by the Company to agree to a dues checkoff provision would contravene the general bargaining order. This is not a matter of conjuncture; indeed, the Court made known its dissatisfaction with the Trial Examiner's reasoning - which the Board adopted - that in the resumed bargaining the Company was not required to agree to a dues checkoff. This reasoning was expressly rejected by the Court (id. at 276, n. 16), thusly, "To suggest that in further bargaining the Company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute."

Nevertheless, the Board apparently was not able to come to grips with the plain import of the Court's teachings. For even after the decision issued, the Board still has sought to pressure its position on the very point as to which this Court differed with the Board. Thus, the Board's brief in opposition to the Company's petition for certiorari in the Supreme Court stated (at p. 7) as follows:

"The Board's order merely directs the Company to bargain with the Union . . . In other words, the Company's past refusal to bargain may have been so egregious that it can now demonstrate its good faith only by making some concession to the Union's demands on this subject."²

It seems clear therefore that the Board's June 22nd determination to close this case is merely the last in a series of instances where it has consistently evinced its refusal to interpret the Court decree in accordance with its plain meaning. At this juncture, it is essential that this Court call a halt to this distressing state of events by issuing an order clarifying its earlier decree, so that the Board, once and for all times, will attached the proper legal interpretation to that decree. This the Union requests through the instant motion. Unless this motion is entertained, the Board will have succeeded in undermining the decision of this Court. Lest we be misunderstood - the Union is not urging or even suggesting that the Court usurp the Board's contempt function, but only that the Court enlighten the Board as to the meaning of its decree so that the Board can exercise its contempt function properly.

^{2.} The Board's restrictive interpretation of the Court decree is rendered even more incongruous in light of the Company's earlier concession that "the effect of the opinion and order of the Court is to require the Company to agree to a dues checkoff provision. This, the Company contends, would be most unfair . . ." See the Company's response (June 21, 1966) to the Union's opposition to the Company's request that this Court stay its decree pending the decision of the Supreme Court on whether to grant certiorari.

WHEREFORE, the Union prays that its motion to reconsider its motion to clarify the decree of the Court be entertained, and the Court clarify its decree as requested by the Union

ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
GEORGE M. COHEN
Attorneys for Movant
United Steelworkers of America,
AFL-CIO.

(Dated July 21, 1967)

(Certificate of Service omitted in printing)

Exhibit A

April 3, 1967

MR. JOHN PENGLIO, Director Baltimore Regional Office 707 North Calvert St. — 6th Floor Baltimore, Maryland 21202

RE: H. K. PORTER COMPANY

Dear Mr. Penello:

As you are already aware, on February 27, 1967 the United Steelworkers of America filed a motion in the Court of Appeals for the District of Columbia Circuit requesting clarification of the decree issued by the Court on May 19, 1966 (363 F. 2d 272). It was the Union's position that this decree required, inter alia, that H. K. Porter Company agree to a dues checkoff provision in its collective bargaining agreement with the Union. Further it was the Union's position that since the Company did not agree with this interpretation on the decree (see George Cohen's statement on file with the Region) it was appropriate for the Court to clarify its decree by advising the Company of its legal obligation thereunder.

On March 22, 1967, the Court of Appeals issued its order in the above captioned matter, as follows:

It appearing that the union's motion to clarify the decree of this court in these proceedings is based in part on facts arising subsequent to the effective date of the decree; and

It further appearing that there is in the record no concession from the company that the facts are as alleged by the union, and that under the circumstances a contempt proceeding, rather than proceedings in connection with a motion to clarify the decree, would be more appropriate to test the company's compliance with the decree;

It is Ordered that the motion for leave to file the motion to clarify the decree is granted.

It is FURTHER ORDERED that the motion to clarify the decree is denied.

In light of this order we are hereby requesting that the Region initiate a contempt action. We would greatly appreciate an expeditious resolution of this matter, and to this end we are prepared to assist you in any manner desired.

Thanking you for your cooperation, I remain
GEORGE COHEN

GH:jm

ce: Domonick Manoli Winn Newman Bernard Kleiman M. C. Weston, Jr. Wilburn Booth

Exhibit B

NATIONAL LABOR RELATIONS BOARD

REGION 5 1019 Federal Building, Charles Center Baltimore, Maryland 21201

Telephone 962-2822

June 22, 1967

MR. DONALD C. WINSON, ESQ. ECKERT, SEAMANS & CHERIN Porter Building, 10th Floor Sixth Avenue & Grant Street Pittsburgh, Pa. 15219

Re: H. K. PORTER COMPANY, INC.
Disston Division — Danville Works
Case No. 5-CA-2785

Dear Mr. Winson:

The Respondent having satisfactorily complied with the affirmative requirements of the Order in the aboveentitled case, and the undersigned having determined that Respondent is also in compliance with the negative provision of the Order, the case is hereby closed. Please note that the closing is conditioned upon continued observance of said Order and does not preclude further proceedings should subsequent violations occur.

> Very truly yours, JOHN A. PENELLO Regional Director

CC: Mr. DANIEL W. SIXBEY, Atty.
DIGGEN & O'BOYLE
1010 Vermont Avenue, N. W.
Washington, D. C. 20005
MICHAEL H. GOTTESMAN, Atty.
1001 Connecticut Avenue, N. W.
Washington, D. C.
JERRY D. ANKER, Atty.
1001 Connecticut Avenue, N. W.
Washington, D. C.

Opposition to Motion for Reconsideration

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioner,

No. 19,492

V.

NATIONAL LABOR RELATIONS BOARD, Respondent.

H. K. PORTER COMPANY, INC., DISSTON DIVISION — DANVILLE WORKS,

> Petitioner, No. 19,507

> > v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Opposition of H. K. Porter Company, Inc. to Motions of United Steelworkers of America

H. K. Porter Company, Inc., the Petitioner in the above-captioned Case No. 19,507, hereby opposes the Motion filed by the United Steelworkers of America requesting this Court to reconsider the Union's prior Motion to Clarify the decree entered May 19, 1966. This Court denied the Union's prior Motion to Clarify on March 22, 1967. The Company also opposes the Union's Motion requesting oral argument.

In opposing the present Motions, the Company submits that the Union's request for clarification is a transparent attempt to seek rehearing of the Order dated May 19, 1966 in the hope that this Court will alter or amend that Order and grant the Union the relief it initially sought, but which this Court declined to grant. In addition the Company submits that the relief sought by the Union in its present Motions is contrary to and precluded by law. Furthermore, there is no need for clarification of this Court's Order, for it is clear and unambiguous in ordering the Company to bargain collectively with the Union upon request.

WHEREFORE, H. K. Porter Company, Inc. requests that the Union's Motions be denied.

Respectfully submitted, s/ DANIEL W. SIXBEY DANIEL W. SIXBEY DIGGINS & O'BOYLE 1010 Vermont Avenue, N.W. Washington, D. C. 20005 Attorneys for H. K. Porter Company, Inc. Of Counsel:
PAUL R. OBERT, Esq.
1500 Porter Building
Pittsburgh, Pennsylvania
DONALD C. WINSON, Esq.
WM. ALVAH STEWART, Esq.

ECKERT, SEAMANS & CHERIN

1000 Porter Building

Pittsburgh, Pennsylvania 15219

(Dated July 25, 1967)

(Certificate of Service omitted in printing)

December 8, 1967 Decision and Order of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 19,492

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

V.

NATIONAL LABOR RELATIONS BOARD, Respondent No. 19,507

> H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE WORKS, Petitioner

> > V.

NATIONAL LABOR RELATIONS BOARD, Respondent UNITED STEELWORKERS OF AMERICA, AFL-CIO, Intervenor

MOTION FOR RECONSIDERATION OF DENIAL OF MOTION TO CLARIFY DECREE

Decided December 8, 1967

Messrs. Elliot Bredhoff, Michael H. Gottesman and George H. Cohen were on the motion for petitioner in No. 19,492 and intervenor in No. 19,507.

Messrs. Daniel W. Sixbey and Bartholomew Diggins were on the opposition for petitioner in No. 19,507.

Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, filed an appearance on behalf of respondent.

Before BAZELON, Chief Judge, WILBUR W. MILLER, Senior Circuit Judge, and WRIGHT, Circuit Judge, in Chambers.

WRIGHT, Circuit Judge: In October 1961 the United Steelworkers of America was certified as the bargaining representative of the production and maintenance am. ployees of the H. K. Porter Company's Danville, Vir. ginia, plant. A year later the union initiated an unfair labor practice proceeding alleging that the company was not making the good faith effort to reach an agreement which Sections 8(a) (5) and 8(d) of the National Labor Relations Act require. In an unreported decision the Trial Examiner, whose decision was adopted by the Board, found that the company had indeed failed to bargain in good faith by, among other things, adamantly refusing to agree to an arbitration provision while insisting on a non-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times. The Examiner concluded that the company "was demanding in effect that the union relinquish the basic rights conferred by the Act or it would not receive a contract," and that the company's actions were designed to "subvert the union's position as the statutory representative." No exceptions were taken to these findings, and in July 1964 the Fourth Circuit enforced the order of the Board that the company bargain in good faith.

In the meantime the company had refused to negotiate at all, pending the Trial Examiner's decision and its approval by the Board. In October 1963 bargaining resumed, with 14 issues in dispute. By November 1964, 21 more meetings had taken place, but still no final agreement was reached. During this period 11 issues were resolved; the union conceded 10,

while the company, 10 months after the Trial Examiner's decision requiring it to do so, finally withdrew its demand for a no-strike clause. Thus, when this second round of negotiations broke down, three issues remained unresolved: checkoff, wages and insurance.

The union had pressed for a checkoff at almost every bargaining session, but the company repeatedly refused to collect the dues of voluntarily paying members because dues collection was the "union's business" which the company would not foster or promote. On several occasions the union offered to withdraw its demand for a checkoff if the company would permit union stewards to collect dues during non-working hours in non-working areas of the plant. But the company rejected this alternative as well.

Again the union initiated unfair labor practice charges, and again the Trial Examiner, whose decision was again adopted by the Board, found that the company had violated its duty to bargain in good faith on the checkoff issue. He concluded, from substantial evidence in the record, that the real and only reason for refusing the checkoff was to "frustrate agreement with the union." At the hearing the company's representative admitted that it made deductions from volunteering employees' wages for a variety of charitable causes and that there would be no inconvenience involved in checking off union dues; that, in fact, the company does check off union dues at certain of its other plants.

On May 19, 1966, this court affirmed the NLRB and granted the Board's cross-petition to enforce its order requiring the company to bargain in good faith. *United Steehvorkers of America v. N.L.R.B.*, H. K. Porter Co.

v. N.L.R.B., 124 U.S. App. D.C. 143, 363 F.2d 272, cert. denied, 385 U.S. 851 (1966). In our opinion we noted an inconsistency in the Board's order. In a footnote, the Trial Examiner had said, "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled."

This conclusion conflicted with the Examiner's finding, in the text, that the company's refusal to grant a checkoff was solely "for the purpose of frustrating agreement with the union * * *." In our opinion enforceing the Board's order, we indicated that to permit the company to refuse a checkoff for some concocted reason not heretofore advanced would make a mockery of the collective bargaining required by the statute. Since the text of the Trial Examiner's decision controls, we ruled that his Footnote 9 should be disregarded. We also invited the Board to initiate contempt proceedings if its order, as we interpreted it, was not complied with.

In the ensuing negotiations the company and the union each urged completely different interpretations of our decree. The company took the position that the decree was merely yet another order that it bargain in good faith — this time on the issue of dues collection. Accordingly, the company proposed to discuss the possibility of making available to the union a table

in the payroll office. The union, on the other hand, asserted not only that it was entitled to its statutory right to collect dues during non-working hours in non-working areas of the plant, but also that under our decision the company was obligated to agree to a contractual dues checkoff provision as well. In other words, the union interpreted the decree as entitling it to both channels of dues collection, while the company construed the decree as requiring it only to negotiate about giving the union some space to collect its own dues.

This disagreement apparently thwarted further bargaining, and on February 28, 1967, the union moved in this court for clarification of the decree. On March 22 we permitted filing of the motion and, on the same day, denied it. However, we again invited the Board to test the competing interpretations of the decree through it contempt process. On April 3 the union wrote to the Regional Director asking that he initiate contempt proceedings; on June 22 the Board responded by letter to this request as follows:

"The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisios of the Order, the case is hereby closed. Please note that the closing is conditioned upon continued observance of said Order and does not preclude further proceedings should subsequent violations occur."

Since the Board had apparently accepted the company's interpretation of the decree as requiring only that it now bargain with the union as to some form of dues

collection, on July 21, 1967, the union filed a motion in this court that we reconsider our earlier denial of its motion to clarify our decree. Permission to file is hereby granted, and to the extent of what follows, the motion to clarify is granted.

I

The Trial Examiner found that the company had no valid reason to refuse a checkoff provision and had done so solely to frustrate an agreement with the union. Though there was an inconsistency in his report, which report the Board adopted in toto, we resolved this contradiction by interpreting the Board's order as foreclosing the company from dreaming up new reasons for refusing a checkoff. By this we did not mean to say that the Board order required the company simply to agree to a checkoff provision. Though it would not be permitted to proffer new reasons for opposing such a clause, it was still free to seek something in return for granting it. Unless it did so, a presumption of continuing bad faith could not be dispelled.

We did not think that under the Board order the company could now purge itself of its bad faith and meet its Section 8(d) obligations by agreeing simply to negotiate on alternatives to a checkoff. Apparently we misread the Board's order, for the Board is apparently satisfied that the employer has complied with its duty to bargain in good faith by agreeing to such negotiations. Certainly the final responsibility for interpreting the Board's order must rest with the Board, for "the relation of remedy to policy is peculiarly a matter of administrative competence." Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 194 (1941). And, in-

deed, it is only the Board that can initiate contempt proceedings even where its order has been enforced by a judicial decree. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940). Since the bargaining impasse may continue, however, some guidance from the court with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining is in order. This case will be remanded to the Board, therefore, for reconsideration in the light of this opinion.

Π

Section 8(a) (5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." The Labor-Management Relations Act extended the duty to bargain to unions, and, in Section 8(d), elucidated its meaning in some detail:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *."1

 ⁶¹ STAT. 142 (1947), 29 U.S.C. § 158(d) (1964).

The statute made explicit what the Board and the courts had already found by implication: that the duty to bargain collectively required the employer to make a good faith effort to reach an accord with the union. So far, on two separate occasions the H. K. Porter Company has been found not to have made such an effort. The company maintains, however, that all the Board can do, despite this tainted record, is issue yet another order that the company mend its ways and begin to bargain in good faith. The company argues that the last clause of Section 8(d)—"but such obligation does not compel either party to agree to a proposal or require the making of a concession"—bars the Board from taking more drastic action.

We do not read Section 8(d) as prohibiting the Board from ordering a company, which has repeatedly flouted its Section 8(a) (5) duty, to make meaningful and reasonable counteroffers, or indeed even to make a concession where such counteroffers or such a concession would be the only way for the company to purge the stain of bad faith that has already soiled its position. In certain cases such action by the company may be the only means of assuring the Board, and the court, that it no longer harbors an illegal intent.

Section 8(d) defines collective bargaining and relates to the determination of whether a Section 8(b) (5) violation has occurred and not to the scope of the rem-

^{2.} See, e.g., N.L.R.B. v. Montgomery Ward & Co., 9 Cir., 133 F.2d 676 (1943); see generally Smith, The Evolution of the "Duty to Bargain" Concept in American Law, 39 Mich. L. Rev. 1065, 1089 (1941); Cox, The Duty to Bargain in Good Faith, 71 HARV. L. Rev. 1401 (1958).

edy which may be necessary to cure violations which have already occurred. That is, Section 8(d) precludes the Board from concluding that an employer had violated its duty to bargain in good faith simply because he did not agree to a particular proposal or make a particular concession. Where, as here, the subject of the dispute is a mandatory subject of bargaining,³ either party may bargain to an impasse provided such bargaining is in good faith, and so long as the employer's position is maintained in good faith, no conclusive inference can be drawn from this obstinacy alone.

But in this case the Trial Examiner found bad faith. Based on the concatenation of circumstances taken as a whole, he concluded that the company's sole purpose in refusing a checkoff was to frustrate agreement with a union that had the statutory right to bargain collectively as the chosen representative of the employees of the plant. This was an unfair labor practice, for the right to refuse a particular proposal or to make a concession may not be used "as a cloak * * * to conceal a purposeful stategy to make bargaining futile or fail." N.L.R.B. v. Herman Sausage Co., 5 Cir., 275 F.2d 229, 232 (1960). Since the company had conceded that it had no business reason for refusing the checkoff, it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union on wages or insurancethe two issues besides checkoff that remained in dispute. Indeed, it is possible that in an appropriate case the Board could simply order the company to grant a checkoff.

^{3.} N.L.R.B. v. Darlington Veneer Co., 4 Cir., 236 F.2d 85 (1956); N.L.R.B. v. Reed & Prince Mfg. Co., 1 Cir., 205 F.2d 131, 136, cert. denied, 346 U.S. 887 (1953).

ш

We recognize that the National Labor Relations Act is grounded on the premise of freedom of contract—albeit collective contract.⁴ The substantive terms of the collective agreement are to be forged by the parties to it, not by the Board.⁵ This ideal of freedom of contract is both a noble and a practical one,⁶ and remedies which impinge on it are not to be casually undertaken. But an equally important policy of the Act is to equal-

^{4.} As the Chairman of the Senate Committee on Education and Labor, Senator Welsh, put it in 1935: "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 Cong. Rec. 7660 (1935).

^{5.} The Board may not "sit in judgment upon the substantive terms of collective bargaining agreements," for the Act does not "regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." N.L.R.B. v. American National Ins. Co., 343 U.S. 395, 404, 402 (1952). Nor can the Board "regulate the choice of economic weapons that may be used as part of collective bargaining"; if it could, "it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. * * * Our labor policy is not presently erected on a foundation of government control of the results of negotiations." N.L.R.B. v. Insurance Agents Union, 361 U.S. 477, 490 (1960). See generally Wellington, Freedom of Contract and the Collective Bargaining Agreement, 112 U. Pa.L. Rev. 467, 469-477 (1964).

^{6.} See Kessler, Contracts of Adhesion - Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629-630 (1943).

ize the bargaining power of employees and employers by assuring and guaranteeing the right of workers to organize and bargain collectively through their elected representatives,⁷ and the major purpose behind the Section 8(a) 5 duty to bargain is to make meaningful this fundamental right of employees.⁸ As the Senate

^{7.} Congress stated the theory of the Act in its first section: "The inequality of bargaining power between employees * * and employers * * tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners * * ." To restore equality of bargaining power it was declared to be a policy of the United States to encourage "the practice and procedure of collective bargaining." 49 STAT. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

As the Supreme Court said in reviewing the legislative history of the Wagner Act: "It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement." N.L.R.B. v Insurance Agents Union, supra Note 5, 361 U.S. at 483. Professor Wellington has termed this the "supportive" function of the duty to bargain. "In the absence of a requirement of good faith negotiation, collective bargaining may never occur. * * * The statutory scheme of protecting organization from unfair practices and of allowing employee choice between union and no-union in such a situation would be frustrated." Wellington, supra Note 5.112 U. Pa. L. REV. at 470. As Professor Cox has put it: "The denial of recognition is an effective means of breaking up a struggling young union too weak for a successful strike. After the enthusiasm of organization and the high hopes of successful negotiations, it is a devastating psychological blow to have the employer shut the office door in the union's face. Imposing a legal duty to recognize the union would prevent such anti-union tactics and thereby contribute to the growth of strong labor organizations." Cox, supra Note 2. 71 HARV. L. REV. at 1408.

Committee report accompanying the National Labor Relations Act put it:

" * * It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as have been designated * * * and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to the law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. * * * S.Rep. No. 573, 74th Cong., 1st. Sess., p. 12 (1935).

To make sure that this primary right is fulfilled, the NLRB has been given broad remedial powers. Section 10 (c) of the Act charges the Board with the task "of devising remedies to effectuate the policies of the Act." N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953) 9 Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will best effectuate the one at least cost to the other. Though ordering an employer to grant a

^{9.} Section 10(c), 29 U.S.C. § 160(c), authorizes the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

checkoff obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively.

This court is cognizant of the fact that the Board's remedial measures have not proved adequate in coping with the recalcitrant employer determined to defeat the effective unionization of his plant by illegally opposing organizational and bargaining efforts every step of the way. 10 As Dr. Ross concluded in his landmark study of duty to bargain cases:

"7. The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act." Ross, Analysis of Administrative Process Under Taft-Hartley, 63 LAB. REL. REP. 132, 133 (BNA 1966).11

^{10.} The H. K. Porter Company has also been found to have committed unfair labor practices in connection with union election campaigns. H. K. Porter, Inc. and United Textile Workers of America, 131 N.L.R.B. 1383 (1961).

^{11.} A special subcommittee on labor of the House Committee on Education and Labor is now considering proposed legislation. H.R. 11725, 90th Cong., 1st Sess., designed to make the National Labor Relations Act remedies more effective. And the Board itself is engaged in a study of whether it should more rigorously exercise its existing remedial powers by awarding compensatory pay for delays caused by illegal refusals to bargain. The Trial Examiner in Zinke's Foods, Inc. NLRB Case No. 30-CA-372, proposed such a remedy, while another Examiner recommended against it in Herman Wilson Lumber Co., NLRB Case No. 25-CA-2536. See also Ex-Cell-O Corp., NLRB Case No. 25-CA-

When the unfair labor practices are committed in locaities where hostility to the union movement may run deep, the determined employer who litigates charges often succeeds in ousting the union despite the Board's repeated findings of Section 8(a) (5) violations.¹² And the testimony of witnesses at the recently completed hearings of the House subcommittee on NLRB remedies shows that the refusal to bargain in good faith is frequently the last ditch effort of the employer to undermine the union whose organizational effort he had been unable to frustrate.¹³

The requirement that a checkoff be granted is at most a minor intrusion on freedom of contract. In a

^{2377,} and Int. U., United Automobile. etc. Workers of America v. NLR.B., Nos. 20,137, 20,185 and 20.301 (appeals pending) where the Board, after denying such a remedy, has asked that the cases be remanded for reconsideration of this question. As the Board said in H. W. Elson Bottling Co., 155 N.L.R.B. 714, 715 (1965): "The Board has a particular duty under Section 10(c) to tailor its remedies to the unfair labor practices which have occurred * * *." "This process requires constant reevaluation of the Board's remedial arsenal so that the 'enlightenment gained from experience' can be applied to the 'actualities of industrial relations.' "Id. at 715 n.5.

^{12. &}quot;The collective bargaining conequences of a remedied violation depended mainly upon the nature and extent of an employer's original resistance to bargaining and his persistence in delaying compliance. Litigated cases frequently differed from non-litigated cases in fundamental ways and employers who litigated charges often succeeded in ousting their unions." Ross, supra, 63 Lab. Rel. Rep. at 133.

^{13.} Testimony before the Special Subcommittee on Labor of the House Committee on Education and Labor on H.R. 11725 (1967).

case such as this, the checkoff provision—a provision which is included in 92 per cent of all manufacturing industries labor contracts —is likely to be of life or death import to the fledgling union, 15 while it is of no consequense whatever to the employer. 16 Yet if the Board can do no more than repeatedly order the company to bargain in good faith, the workers' rights to bargain collectively may be nullified. The Board is empowered to see that this does not happen. Where an employer has twice been found to have violated his duty to bargain in good faith, a checkoff in return for a reason-

^{14.} See BNA, COLLECTIVE BARGAINING NEGOTIA-TIONS AND CONTRACTS, p. 87:3 Most of the contracts not containing a checkoff provide for some alternative method of dues collection on company property. Id. at p. 87:901.

^{15.} In the instant case, the nearest union office was in Roanoke, Virginia, 85 miles from the plant. The employees were scattered over a wide area. As we said in our original opinion, collection of dues without a check-off would have presented the union with a substantial problem of communication and transportation.

^{16. &}quot;The check-off is of great consequence to the union, as it avoids the necessity of collecting dues each and every week. It is of small consequence to the employer, especially if the union agrees to bear the additional expenses." Supplemental statement of Frank Thompson, Jr., Chairman, Special Subcommittee on Labor. September 14, 1966, HEARING BEFORE THE SPECIAL SUBCOMMITTE ON EDUCATION AND LABOR, HOUSE OF REPRESENTATIVES, 89 Cong., 2d Sess., p. 77 (1966). In fact, the Subcommittee recommended that the simple refusal to agree to a checkoff paid for by the union should itself be recognized "as a criteria of bad faith bargaining" and "an indication of anti-union animus." Ibid. In the instant case the company admitted that it had no business reason for opposing the checkoff.

able concession by the union¹⁷ may be the only effective remedy. Such a remedy "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' Virginia Elec. & Power Co. v. Labor Board, 319 U.S. 533, 540." Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 216 (1964).

Remanded

Senior Circuit Judge WILBUR K. MILLER dissents.

^{17.} The Board has not undertaken to oversee the reasonableness of the substantive terms of collective bargaining contracts. Nor has it found a breach of the duty to bargain by considering simply the reasonableness of the offers and counteroffers made by the parties. This is as it should be. But as Judge Magruder pointed out: "[I]f the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." N.L.R.B. v. Reed & Prince Mfg. Co., supra Note 3, 205 F.2d at 134. The Board could make a comparable judgment in deciding whether its remedial crater that reasonable counter offers be made has been complied with.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,492 SEPTEMBER TERM, 1967

United Steelworkers of America, Petitioner, v.

National Labor Relations Board, Respondent.

NO. 19,507

H. K. Porter Company, Inc., Petitioner, v. National Labor Relations Board, Respondent.

Before: BAZELON, Chief Judge, WILBUR K.
MILLER, Senior Circuit Judge and
WRIGHT, Circuit Judge in Chambers.

UNITED STATES COURT OF APPEALS for the District of Columbia Circuit Filed Dec. 8, 1967

NATHAN J. PAULSON Clerk

Order

On consideration of the motion of United Steelworkers of America, AFL-CIO, for leave to file its lodged motion for reconsideration, it is

ORDERED by the Court that the Clerk is directed to file the lodged motion for reconsideration, the opposition thereto, and the motion requesting oral argument, and on consideration whereof, it is

FURTHER ORDERED by the Court that to the extent of the Court's opinion issued this date the motion to clarify is granted, and this case is remanded to the Board for reconsideration in light of the opinion.

Per Curiam.

Senior Circuit Judge Wilbur K. Miller dissents.

Supplemental Decision and Order of NLRB 172 NLRB No. 72 D-983

Danville, Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD

H. K. PORTER COMPANY, INC.

DISSTON DIVISION-DANVILLE WORKS
and

UNITED STEELWORKERS OF AMERICA,

AFL-CIO

Case 5-CA-2785

On July 9, 1965, the National Labor Relations Board issued its Decision and Order in this case¹ finding that the Respondent had violated Section 8(a)(5) of the National Labor Relations Act, as amended, by failing to bargain in good faith with the Union on the issue of a checkoff provision in the collective-bargaining agreement with the Union. The Board thereupon ordered the Respondent to bargain collectively. On May 19, 1966, the United States Court of Appeals for the District of Columbia enforced the Board's Order.² Pursuant to a motion by the Union, the Court, on December 8, 1967, issued a decision clarifying its earlier decree and remanding the proceeding to the Board.³

The Board in the original decision herein concluded that the real and only reason for refusing the checkoff was to "frustrate agreement with the union" and ordered the Respondent to bargain with the Union. In enforcing that order the Court stated that it was "not necessary to include a specific reference to checkoff in the Board's order." The Court also indicated that in any contempt proceeding instituted in the case it would be able to make a judgment based on the Respondent's performance at the bargaining table.

In subsequent contract negotiations the parties each urged divergent interpretations of the Court's decree. Briefly stated, the Union interpreted the decree as obligating the Company to agree to a contractual

 ¹⁵³ NLRB 1370.

^{2.} United Steelworkers of America v. N.L.R.B.; H. K. Porter Co. v. N.L.R.B., 363 F.2d 272 (C. A. D.C.), cert. denied 385 U.S. 851.

^{3. 389} F. 2d 295 (C. A. D.C.).

^{4. 363} F. 2d 272 at 276.

dues-checkoff provision, while the Company construed the decree as requiring it only to discuss the possibility of giving a checkoff or some form thereof and therefore its offer to give the Union space in the payroll office to collect its dues fulfilled its obligation. Thereafter, the Regional Director for Region 5 indicated to the Union that the Respondent had satisfactorily complied with the decree and the Board declined to institute contempt proceedings.

In its decision granting the Union's motion to reconsider an earlier denial of a motion to clarify its enforcement decree, the Court noted the parties' divergent interpretations of the Order, and the subsequent bargaining impasse which had arisen therefrom. It believed, therefore, that "some guidance from the Court with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining is in order."⁵

The Court noted that on two separate occasions the Respondent had been found to have violated Section 8(a) (5) by not making a good-faith effort to reach agreement with the Union.⁶ The Court indicated that "the workers' rights to bargain collectively may be nullified" when a company repeatedly flouts its bargaining obligation, if the Board does no more "than repeatedly order the company to bargain in good faith." The Court thereupon held that in such circumstances the Board may order the company to make "meaningful and reasonable counteroffers, or indeed even to make a con-

²⁸⁹ F.2d 295 at 298.

The instant case and an earlier unreported Trial Examiner's Decision in Case 5-CA-2344.

cession." Pointing out that the Respondent had conceded that it had no business reason for refusing to grant a checkoff, the Court stated that "it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union" on one of the remaining issues. And "it is possible," added the Court, "that in an appropriate case the Board could simply order the company to grant a checkoff"

The Court recognized that the Act is grounded on the premise of freedom of contract. However, it also pointed out that Section 8(a) (5) intends to make meaningful the fundamental duty of the employer to bargain with the representative of the employees. When these two concepts are in conflict, the Court further stated, "the Board must seek to devise remedies which will best effectuate the one at least cost to the other."

As respondent has repeatedly violated Section 8(a) (5) and admittedly had no business reason for opposing the checkoff, and as its only reason for such opposition was to frustrate agreement with the Union, we conclude in accordance with the Court's rationale, that an order to grant checkoff is warranted in the circumstances of this case. To permit Respondent to hold out for some "reasonable concession" by the Union in return for the checkoff requirement would imply that the Respondent is now being ordered to surrender a position that it had legitimately maintained. Such an implication would be contrary to our finding, affirmed by the Court of Appeals, that Respondent's opposition to granting checkoff was based solely on a desire to thwart the consumation of a collective-bargaining argeement.

Accordingly, we shall vacate our initial order in this case and shall direct that Respondent grant a checkoff provision to the Union.

Supplemental Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders the H. K. Porter Company, Inc., Disston Division-Danville Works, Danville, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

- (a) Refusing to bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive collective-bargaining representative of its employees in a unit composed of all production and maintenance employees at its Danville, Virginia, plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in said Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.
- 2. Take the following affirmative action found necessary to effectuate the policies of said Act:
- (a) Upon request bargain collectively with United Steelworkers of America, AFL-CIO, as the ex-

clusive representative of the employees in the aforesaid unit, and embody any understanding reached into a signed contract.

- (b) Grant to the Union a contract clause providing for the checkoff of union dues.
- (c) Post at its plant in Danville, Virginia, copies of the notice attached marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 5, shall, after being signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.
- (d) Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C. July 3, 1968.

FRANK W. McCulloch, Chairman John H. Fanning, Member Gerald A. Brown, Member Sam Zagoria, Member National Labor Relations Board

[SEAL]

^{7.} In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be subtituted for the words "a Decision and Order" the word "a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL, upon request, bargain collectively with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of our employees in a unit composed of all production and maintenance employees at our Danville, Virginia, plant, excluding office clerical employees, professional employees, guards, and supervisors, as defined in the National Labor Relations Act, with respect to rates of pay and other terms and conditions of employment, and if an understanding is reached, embody the same into a signed agreement.

WE WILL grant to the Union a contract clause providing for the checkoff of union dues.

WE WILL Not by refusing to bargain collectively with the duly designated representative of our employees, or in any like or related manner, interfere with, restrain, or coerce our employees, in the exercise of their right to self-organization, to form, join, or assist the above-named, or any other labor organization of our employees, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purposes of mutual aid, or to refrain from any or all such activities.

Supplemental Decision and Order of NLRB.

All our employees are free to become, remain, or refrain from becoming or remaining members of the above named or any other labor organization.

H. K. PORTER COMPANY, INC.
(Employer)

By(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Room 1019, Federal Building, Charles Center, Baltimore, Maryland 21201 (Tel. No. 962-2822), if they have any question concerning this notice or compliance with its provision.

April 22, 1969 Order of Court of Appeals.

April 22, 1969 Order of Court of Appeals
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,222

SEPTEMBER TERM, 1968

H. K. Porter Company, Inc.,
Disston Division—Danville Works, Petitioner
v.

National Labor Relations Board, Respondent United Steelworkers of America, AFL-CIO, Intervenor

UNITED STATES COURT OF APPEALS for the District of Columbia Circuit Filed April 22, 1969

> NATHAN J. PAULSON Clerk

Petition to review and set aside and cross-petition to enforce an order of the National Labor Relations Board.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.

Order

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside and a cross-petition to enforce an order of the National Labor Relations Board, and was argued by counsel.

This case has been before this court on two prior occasions. See United Steelworkers of America, AFL-CIO v. N.L.R.B., 124 U.S.App.D.C. 143, 363 F. 2d 272, cert. denied, 385 U.S. 851 (1966); United Steelworkers of America, AFL-CIO v N.L.R.B., 128 U.S. App. D.C. 344, 389 F. 2d 295 (1967). For the reasons stated in those opinions, as well as in the Board's supplemental decision and order dated July 3, 1968, which is attached as an appendix to this order, it is

ORDERED by the court that the petition for review of the supplemental decision and order of the Board dated July 3, 1968, be, and the same is hereby, denied, and the Board's order is hereby enforced.

Per Curiam.

Senior Circuit Judge WILBUR K. MILLER dissents.

Order of Supreme Court of United States.

October 13, 1969 Order of Supreme Court of United States

SUPREME COURT OF THE UNITED STATES
No. 230, October Term, 1969
H. K. PORTER COMPANY, INC., etc.,
Petitioner

V.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 13, 1969.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.



FILE COPY

FILED

JUN 13 1969

IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 130

H. K. PORTER COMPANY, INC.
DISSTON DIVISION — DANVILLE WORKS,
Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD, and

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

DONALD C. WINSON
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner

PAUL R. OBERT
THOMAS P. LUSCHER
1500 Porter Building
Pittsburgh, Pennsylvania 15219

WM. ALVAH STEWART
ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Of Counsel



INDEX

		P.	AGE
Op	inion	s below	2
Ju	risdic	etion	2
Qu	estio	n presented	3
Sta	tute	involved	3
Sta	teme	ent of the case	4
Reasons for granting the writ			8
Conclusion			13
Ap	ppendix 14		
	A.	Court of Appeals' clarifying opinion and order of December 8, 1967	14
	B.	Supplemental Decision and Order of National Labor Relations Board	32
	C.	Court of Appeals' Order of April 22, 1969	39
	D.	Relevant provisions of the National Labor Relations Act	41

Table of Authorities Cited

TABLE OF AUTHORITIES CITED

CASES PAGE
NLRB v. American Aggregate Co., 335 F.2d 253 (5th Cir. 1964) 11
NLRB v. American National Ins. Co., 343 U.S. 395 (1952) 10
NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960)
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 9
NLRB v. Lewin-Mathes Co., 285 F.2d 329 (7th Cir. 1960
NLRB v. United Clay Mines Corp., 219 F.2d 120 (6th Cir. 1955)
Retail Clerks International Association v. NLRB, 373 F.2d 655 (D.C. Cir. 1967) 11
STATUTES
National Labor Relations Act
∂ (a) (5)
§ 8(d)3, 9, 10, 40
§ 10(c)

Supreme Court of the United States

OCTOBER TERM, 1969

NO.

H. K. PORTER COMPANY, INC.
DISSTON DIVISION — DANVILLE WORKS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, and

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, H. K. Porter Company, Inc., Disston Division-Danville Works, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 22, 1969, enforcing a supplemental decision and order of the National Labor Relations Board.

OPINIONS BELOW

The clarifying opinion of the United States Court of Appeals for the District of Columbia Circuit which remanded this case to the National Labor Relations Board on December 8, 1967 (App. pp. 14-31)*, is reported at 389 F.2d 295 (D.C. Cir. 1967). The supplemental decision and order of the National Labor Relations Board, issued on remand on July 3, 1968 (App. pp. 31-38), are reported at 172 NLRB No. 72. The per curiam order of the United States Court of Appeals for the District of Columbia Circuit enforcing the supplemental decision and order of the National Labor Relations Board (App. pp. 39-40) has not, as yet, been officially reported.

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the District of Columbia Circuit, entered April 22, 1969 (App. pp. 39-40), is invoked under the provisions of 28 U.S.C. § 1254(1).

^{*}The abbreviation "App." refers to the appendix to this petition.

QUESTION PRESENTED

The question presented is whether under the National Labor Relations Act the National Labor Relations Board has the power to order a party to agree to a substantive provision of a collective bargaining agreement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, et seq.), which are involved in this case are set forth in the Appendix, pp. 40-41. For the convenience of the Court, however, the pertinent provisions of Section 8(d) of the National Labor Relations Act are set forth immediately below.

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ." (Emphasis added).

STATEMENT OF THE CASE

The judgment and decision, of which review by this Court is now sought, enforced, with one judge dissenting, a supplemental order of the National Labor Relations Board requiring the Petitioner to take the following affirmative action:

"Grant to the Union a contract clause providing for the checkoff of union dues" (App. p. 36).

H. K. Porter Company, Inc., Disston Division-Danville Works (hereinafter referred to as the "Company" or "Petitioner") contends that the National Labor Relations Board (hereinafter referred to as the "Board") is absolutely devoid of the power to require the Company to grant such a contract clause.

This case initially arose from negotiations between the Company and the United Steelworkers of America, AFL-CIO (hereinafter referred to as the "Union") for a collective bargaining agreement (§ I JA 47-48). During these negotiations, the Union insisted that any labor contract between the parties must contain a provision for the collection of dues, and the Company refused to accede to this demand (§ I JA 47). The Union filed unfair labor practice charges (§ I JA 36-37), and, on July 9, 1965, the Board issued its original decision and order finding that the Company had violated Section 8(a) (5) of the National Labor Relations Act by failing to bargain in good faith on the issue of a contractual dues checkoff provision (§ I JA 58-59). The

^{*}The abbreviation "JA" refers to the joint appendix which was filed with the Court of Appeals and which is a part of the certified record in this case.

Board ordered the Company to bargain collectively with the Union (§ I JA 58-59).

On July 15, 1965, the Union filed in the United States Court of Appeals for the District of Columbia Circuit (hereinafter referred to as the "Court of Appeals") a petition to review the Board's original decision and order. In its petition, the Union contended that the Board had erred in not ordering the Company to agree to a contract clause providing for dues check-off (App. pp. 16-19). The Company also filed a petition to review the original order of the Board and the Board filed a cross-application for enforcement of its order. On May 19, 1966, the Court of Appeals enforced the Board's original order. 363 F.2d 272 (D.C. Cir.), cert. denied 385 U.S. 851 (1966).

The Company and the Union, in the ensuing contract negotiations, advocated divergent interpretations of the Board's original order as enforced by the Court of Appeals (App. pp. 17-18). The Union contended that the order of the Board, as enforced, required the Company to grant a contract clause providing for the checkoff of union dues (App. pp. 17-18). The Company contended that while the order required it to bargain in good faith over dues collection, the order did not compel the Company to agree to a dues checkoff provision (App. p. 17).

On February 28, 1967, the Union filed a motion for clarification of the Court of Appeals' order of May 19, 1966. In its motion, the Union requested the Court of Appeals to advise the parties that its order required the Company to agree to the Union's request for a contractual dues checkoff provision (App. pp. 17-18). On

March 22, 1967, the Union's motion was denied by the Court of Appeals on the grounds "that there is in the record no concession from the Company that the facts are as alleged by the Union, and that under the circumstances a contempt proceeding, rather than proceedings in connection with a motion to clarify the decree, would be more appropriate to test the Company's compliance with the decree." (App. p. 18).

On April 3, 1967, the Union wrote to John A. Penello, Regional Director of Region 5, National Labor Relations Board, asking that a contempt action be initiated against the Company because the Company had not agreed to a dues checkoff provision in its collective bargaining agreement with the Union (App. p. 18).

On June 22, 1967, Regional Director Penello wrote to counsel for the parties as follows:

"The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisions of the Order, the case is hereby closed" (App. p. 18).

After the Board thus had found the Company to be in compliance with its original order and had closed the case, the Union, on July 21, 1967, filed a motion asking the Court of Appeals to reconsider its denial of the Union's earlier motion for clarification. On December 8, 1967, the Court of Appeals (still, without any evidence on the record or admissions by the Company to support the allegations in the Union's motions) granted the Union's motion for clarification, is-

sued a further opinion "with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining", and remanded the case to the Board "for reconsideration in the light of this opinion" (App. p. 20).

On July 3, 1968 the Board issued its supplemental decision and order affirmatively requiring the Company to "Grant to the Union a contract clause providing for the checkoff of Union dues" (App. pp. 31-38).

The Company then filed a petition to review and set aside the supplemental order of the Board and the Board cross-petitioned for enforcement of its supplemental order. The Union intervened in these proceedings. As previously indicated, the Board's supplemental order was enforced by the Court of Appeals' order entered April 22, 1969 (App. pp. 39-40).

REASONS FOR GRANTING THE WRIT

Initially it should be emphasized that this case does not involve the question of whether a party can be ordered to execute a labor contract to which it has previously agreed. In this case, the Company has been expressly ordered to agree to a contract demand made by the Union during collective bargaining negotiations. Specifically, the Board has ordered the Company to:

"Grant to the Union a contract clause providing for the checkoff of union dues" (App. p. 36).

The important point of this case is not whether this particular Union should or should not be granted a provision for dues checkoff at the Company's Danville Works, but whether the Board, as a remedy for violations of Section 8(a)(5) of the National Labor Relations Act. can so involve itself in the collective bargaining process as to compel unilateral concessions which could not be won at the bargaining table. While the Court of Appeals, as stated in its clarifying opinion in this case, believes that "the requirement that a checkoff be granted is at most minor intrusion on freedom of contract" (App. p. 27), if the Board can order Petitioner to agree to this contract clause, there is nothing to prevent it from ordering agreement with regard to wage rates, fringe benefits and other terms and conditions of collective bargaining agreements.

The Company contends that the Board does not have the power under the National Labor Relations Act to order a party to agree to any substantive provision of a collective bargaining agreement.

Section 8(d) of the National Labor Relations Act, in defining the obligation to bargain in good faith, provides in part:

"... but such obligation does not compel either party to agree to a proposal or require the making of a concession..." (Emphasis added).

The Board, of course, is empowered by Section 10(c) of the Act to formulate orders to remedy the commission of unfair labor practices, but the Board's remedial orders certainly must not conflict with the policy of the Act and the intent of the Congress as expressed in the Act. Petitioner submits that the Board's supplemental order in this case is in violation of the policy of the National Labor Relations Act and the clear intention and mandate of the Congress as expressly set forth in Section 8(d) of the Act.

This Court has consistently recognized that the National Labor Relations Act cannot be utilized, even by indirection, to compel a party to agree to a substantive provision of a collective bargaining agreement. Even prior to the enactment of Section 8(d), this Court stated in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937):

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The Theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does

not attempt to compel." (Emphasis added).

Similarly, this Court, subsequent to the enactment of Section 8(d), said in NLRB v. American National Ins. Co., 343 U.S. 395, 404 (1952):

"And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (Emphasis added).

The present remedial order of the Board represents the precise evil which Congress meant to obviate when it enacted Section 8(d). As Mr. Justice Brennan, reviewing the legislative history of Section 8(d), said in NLRB v. Insurance Agents' International Union, 361 U.S. 477, 486-87 (1960):

"Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. And in fact criticism of the Board's application of the 'good-faith' test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice. Thus, in 1947 in Congress the fear was expressed that the Board had 'gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make.' H. R. Rep. No. 245, 80th Cong., 1st Sess., P. 19. Since the Board was not viewed

by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into § 8(d) of the Act....

"The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended... But it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements." (Emphasis added).

Notwithstanding the contrary admonitions of this Court and the United States Congress, the Court of Appeals, in enforcing the supplemental order of the Board, has given the Board the power to control the settling of the terms of collective bargaining agreements.

The Board's supplemental order, as enforced by the Court of Appeals, is also in conflict with the pronouncements of many other circuits that the Board may not, directly or indirectly, compel a bargaining party to agree to a substantive term of a labor contract. NLRB v. American Aggregate Co., 335 F.2d 253 (5th Cir. 1964); NLRB v. Lewin-Mathes Co., 285 F.2d 329 (7th Cir. 1960); NLRB v. United Clay Mines Corp., 219 F.2d 120 (6th Cir. 1955). In fact, the Board's present order is even in conflict with a prior decision of the same Court of Appeals which enforced the Board's supplemental order in this case. Retail Clerks International Association v. NLRB, 373 F.2d 655, 660 (D.C. Cir. 1967).

The Board, being an agency created by the Congress, cannot assume or exercise powers in excess of those given to it by the Congress. In this case, the Board, at the instance and with the sanction of the Court of Appeals, has assumed a power which the Congress not only failed to grant, but indeed expressly withheld.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

DONALD C. WINSON
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner

PAUL R. OBERT
THOMAS P. LUSCHER
1500 Porter Building
Pittsburgh, Pennsylvania 15219

WM. ALVAH STEWART
ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Of Counsel

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,492

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner

V.

NATIONAL LABOR RELATIONS BOARD, Respondent No. 19.507

H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE WORKS, Petitioner

V.

NATIONAL LABOR RELATIONS BOARD, Respondent UNITED STEELWORKERS OF AMERICA, AFL-CIO, Intervenor

Motion for Reconsideration of Denial of Motion to Clarify Decree

Decided December 8, 1967

Messrs. Elliot Bredhoff, Michael H. Gottesman and George H. Cohen were on the motion for petitioner in No. 19.492 and intervenor in No. 19.507.

Messrs. Daniel W. Sixbey and Bartholomew Diggins were on the opposition for petitioner in No. 19,507.

Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, filed an appearance on behalf of respondent.

Before BAZELON, Chief Judge, WILBUR W. MILLER, Senior Circuit Judge, and WRIGHT, Circuit Judge, in Chambers.

WRIGHT, Circuit Judge: In October 1961 the United Steelworkers of America was certified as the bargaining representative of the production and maintenance employees of the H. K. Porter Company's Danville, Virginia, plant. A year later the union initiated an unfair labor practice proceeding alleging that the company was not making the good faith effort to reach an agreement which Sections 8(a) (5) and 8(d) of the National Labor Relations Act require. In an unreported decision the Trial Examiner, whose decision was adopted by the Board, found that the company had indeed failed to bargain in good faith by, among other things, adamantly refusing to agree to an arbitration provision while insisting on a no-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times. The Examiner concluded that the company "was demanding in effect that the union relinquish the basic rights conferred by the Act or it would not receive a contract," and that the company's actions were designed to "subvert the union's position as the statutory representative." No exceptions were taken to these findings, and in July 1964 the Fourth Circuit enforced the order of the Board that the company bargain in good faith.

In the meantime the company had refused to negotiate at all, pending the Trial Examiner's decision and its approval by the Board. In October 1963 bargaining resumed, with 14 issues in dispute. By November 1964, 21 more meetings had taken place, but still no final agreement was reached. During this period 11 issues were resolved; the union conceded 10, while the company, 10 months after the Trial Exam-

iner's decision requiring it to do so, finally withdrew its demand for a no-strike clause. Thus, when this second round of negotiations broke down, three issues remained unresolved: checkoff, wages and insurance.

The union had pressed for a checkoff at almost every bargaining session, but the company repeatedly refused to collect the dues of voluntarily paying members because dues collection was the "union's business" which the company would not foster or promote. On several occasions the union offered to withdraw its demand for a checkoff if the company would permit union stewards to collect dues during non-working hours in non-working areas of the plant. But the company rejected this alternative as well.

Again the union initiated unfair labor practice charges, and again the Trial Examiner, whose decision was again adopted by the Board, found that the company had violated its duty to bargain in good faith on the checkoff issue. He concluded, from substantial evidence in the record, that the real and only reason for refusing the checkoff was to "frustrate agreement with the union." At the hearing the company's representative admitted that it made deductions from volunteering employees' wages for a variety of charitable causes and that there would be no inconvenience involved in checking off union dues; that, in fact, the company does check off union dues at certain of its other plants.

On May 19, 1966, this court affirmed the NLRB and granted the Board's cross-petition to enforce its order requiring the company to bargain in good faith. *United Steelworkers of America v. N.L.R.B.*, H. K. Porter Co. v. N.L.R.B., 124 U.S. App. D.C. 143, 363 F.2d 272, cert. denied, 385 U.S. 851 (1966). In our opinion we noted

an inconsistency in the Board's order. In a footnote, the Trial Examiner had said, "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled."

This conclusion conflicted with the Examiner's finding, in the text, that the company's refusal to grant a checkoff was solely "for the purpose of frustrating agreement with the union * * *." In our opinion enforcing the Board's order, we indicated that to permit the company to refuse a checkoff for some concocted reason not heretofore advanced would make a mockery of the collective bargaining required by the statute. Since the text of the Trial Examiner's decision controls, we ruled that his Footnote 9 should be disregarded. We also invited the Board to initiate contempt proceedings if its order, as we interpreted it, was not complied with.

In the ensuing negotiations the company and the union each urged completely different interpretations of our decree. The company took the position that the decree was merely yet another order that it bargain in good faith — this time on the issue of dues collection. Accordingly, the company proposed to discuss the possibility of making available to the union a table in the payroll office. The union, on the other hand, asserted not only that it was entitled to its statutory

right to collect dues during non-working hours in nonworking areas of the plant, but also that under our decision the company was obligated to agree to a contractual dues checkoff provision as well. In other words, the union interpreted the decree as entitling it to both channels of dues collection, while the company construed the decree as requiring it only to negotiate about giving the union some space to collect its own dues.

This disagreement apparently thwarted further bargaining, and on February 28, 1967, the union moved in this court for clarification of the decree. On March 22 we permitted filing of the motion and, on the same day, denied it. However, we again invited the Board to test the competing interpretations of the decree through it contempt process. On April 3 the union wrote to the Regional Director asking that he initiate contempt proceedings; on June 22 the Board responded by letter to this request as follows:

"The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisios of the Order, the case is hereby closed. Please note that the closing is conditioned upon continued observance of said Order and does not preclude further proceedings should subsequent violations occur."

Since the Board had apparently accepted the company's interpretation of the decree as requiring only that it now bargain with the union as to some form of dues collection, on July 21, 1967, the union filed a motion in this court that were consider our earlier denial of its

motion to clarify our decree. Permission to file is hereby granted, and to the extent of what follows, the motion to clarify is granted.

I

The Trial Examiner found that the company had no valid reason to refuse a checkoff provision and had done so solely to frustrate an agreement with the union. Though there was an inconsistency in his report, which report the Board adopted in toto, we resolved this contradiction by interpreting the Board's order as fore-closing the company from dreaming up new reasons for refusing a checkoff. By this we did not mean to say that the Board order required the company simply to agree to a checkoff provision. Though it would not be permitted to proffer new reasons for opposing such a clause, it was still free to seek something in return for granting it. Unless it did so, a presumption of continuing bad faith could not be dispelled.

We did not think that under the Board order the company could now purge itself of its bad faith and meet its Section 8(d) obligations by agreeing simply to negotiate on alternatives to a checkoff. Apparently we misread the Board's order, for the Board is apparently satisfied that the employer has complied with its duty to bargain in good faith by agreeing to such negotiations. Certainly the final responsibility for interpreting the Board's order must rest with the Board, for "the relation of remedy to policy is peculiarly a matter of administrative competence." Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 194 (1941). And, indeed, it is only the Board that can initiate contempt proceedings even where its order has been enforced

by a judicial decree. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940). Since the bargaining impasse may continue, however, some guidance from the court with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining is in order. This case will be remanded to the Board, therefore, for reconsideration in the light of this opinion.

п

Section 8(a) (5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." The Labor-Management Relations Act extended the duty to bargain to unions, and, in Section 8(d), elucidated its meaning in some detail:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *."1

The statute made explicit what the Board and the courts had already found by implication: that the duty

¹⁶¹ STAT. 142 (1947), 29 U.S.C. § 158(d) (1964).

to bargain collectively required the employer to make a good faith effort to reach an accord with the union.² So far, on two separate occasions the H. K. Porter Company has been found not to have made such an effort. The company maintains, however, that all the Board can do, despite this tainted record, is issue yet another order that the company mend its ways and begin to bargain in good faith. The company argues that the last clause of Section 8(d)—"but such obligation does not compel either party to agree to a proposal or require the making of a concession"—bars the Board from taking more drastic action.

We do not read Section 8(d) as prohibiting the Board from ordering a company, which has repeatedly flouted its Section 8(a) (5) duty, to make meaningful and reasonable counteroffers, or indeed even to make a concession where such counteroffers or such a concession would be the only way for the company to purge the stain of bad faith that has already soiled its position. In certain cases such action by the company may be the only means of assuring the Board, and the court, that it no longer harbors an illegal intent.

Section 8(d) defines collective bargaining and relates to the determination of whether a Section 8(b) (5) violation has occurred and not to the scope of the remedy which may be necessary to cure violations which have already occurred. That is, Section 8(d) precludes

²See, e.g., N.L.R.B. v. Montgomery Ward & Co., 9 Cir., 133 F.2d 676 (1943); see generally Smith, The Evolution of the "Duty to Bargain" Concept in American Law, 39 MICH. L. REV. 1065, 1089 (1941); Cox, The Duty to Bargain in Good Faith, 71 HARV. L. REV. 1401 (1958).

the Board from concluding that an employer had violated its duty to bargain in good faith simply because he did not agree to a particular proposal or make a particular concession. Where, as here, the subject of the dispute is a mandatory subject of bargaining,³ either party may bargain to an impasse provided such bargaining is in good faith, and so long as the employer's position is maintained in good faith, no conclusive inference can be drawn from this obstinacy alone.

But in this case the Trial Examiner found bad faith. Based on the concatenation of circumstances taken as a whole, he concluded that the company's sole purpose in refusing a checkoff was to frustrate agreement with a union that had the statutory right to bargain collectively as the chosen representative of the employees of the plant. This was an unfair labor practice, for the right to refuse a particular proposal or to make a concession may not be used "as a cloak * * * to conceal a purposeful stategy to make bargaining futile or fail." N.L.R.B. v. Herman Sausage Co., 5 Cir., 275 F.2d 229, 232 (1960). Since the company had conceded that it had no business reason for refusing the checkoff. it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union on wages or insurancethe two issues besides checkoff that remained in dispute. Indeed, it is possible that in an appropriate case the Board could simply order the company to grant a checkoff.

³N.L.R.B. v. Darlington Veneer Co., 4 Cir., 236 F.2d 85 (1956); N.L.R.B. v. Reed & Prince Mfg. Co., 1 Cir., 205 F.2d 131, 136, cert. denied, 346 U.S. 887 (1953).

ш

We recognize that the National Labor Relations Act is grounded on the premise of freedom of contract—albeit collective contract. The substantive terms of the collective agreement are to be forged by the parties to it, not by the Board. This ideal of freedom of contract is both a noble and a practical one, and remedies which impinge on it are not to be casually undertaken. But an equally important policy of the Act is to equal-

⁴As the Chairman of the Senate Committee on Education and Labor, Senator Welsh, put it in 1935: "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 CONG. REC. 7660 (1935).

5The Board may not "sit im judgment upon the substantive terms of collective bargaining agreements," for the Act does not "regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." N.L.R.B. v. American National Ins. Co., 343 U.S. 395, 404, 402 (1952). Nor can the Board "regulate the choice of economic weapons that may be used as part of collective bargaining"; if it could, "it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. " " Our labor policy is not presently erected on a floundation of government control of the results of negotiations." N.L.R.B. v. Insurance Agents Union, 361 U.S. 477, 490 (1960). See generally Wellington, Freedom of Contract and the Collective Bargaining Agreement, 112 U. Pa.L. Rev. 467, 469-477 (1964).

⁶See Kessler, Contracts of Adhesion-Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629-630 (1943). ize the bargaining power of employees and employers by assuring and guaranteeing the right of workers to organize and bargain collectively through their elected representatives,⁷ and the major purpose behind the Section 8(a) 5 duty to bargain is to make meaningful this fundamental right of employees.⁸ As the Senate

⁷Congress stated the theory of the Act in its first section: "The inequality of bargaining power between employees * * * and employers * * * tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners * * *." To restore equality of bargaining power it was declared to be a policy of the United States to encourage "the practice and procedure of collective bargaining." 49 STAT. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

⁸As the Supreme Court said in reviewing the legislative history of the Wagner Act: "It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement." N.L.R.B. v Insurance Agents Union, supra Note 5, 361 U.S. at 483. Professor Wellington has termed this the "supportive" function of the duty to bargain. "In the absence of a requirement of good faith negotiation, collective bargaining may never occur. * The statutory scheme of protecting organization from unfair practices and of allowing employee choice between union and no-union in such a situation would be frustrated." Wellington, supra Note 5. 112 U. Pa. L. REV. at 470. As Professor Cox has put it: "The denial of recognition is an effective means of breaking up a struggling young union too weak for a successful strike. After the enthusiasm of organization and the high hopes of successful negotiations, it is a devastating pyschological blow to have the employer shut the office door in the union's face. Imposing a legal duty to recognize the union would prevent such anti-union tactics and thereby contribute to the growth of strong labor organizations." Cox, supra Note 2, 71 Harv. L. Rev. at 1408.

Committee report accompanying the National Labor Relations Act put it:

"* * * It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as have been designated * * * and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to the law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. * * * " S.Rep No. 573. 74th Cong., 1st Sess., p. 12 (1935).

To make sure that this primary right is fulfilled, the NLRB has been given broad remedial powers. Section 10 (c) of the Act charges the Board with the task "of devising remedies to effectuate the policies of the Act." N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953) Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will best effectuate the one at least cost to the other. Though ordering an employer to grant a checkoff

⁹Section 10(c), 29 U.S.C. § 160(c), authorizes the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively.

This court is cognizant of the fact that the Board's remedial measures have not proved adequate in coping with the recalcitrant employer determined to defeat the effective unionization of his plant by illegally opposing organizational and bargaining efforts every step of the way. 10 As Dr. Ross concluded in his landmark study of duty to bargain cases:

"7. The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act." Ross, Analysis of Administrative Process Under Taft-Hartley, 63 LAB. REL. REP. 132, 133 (BNA 1966).11

¹⁰The H. K. Porter Company has also been found to have committed unfair labor practices in connection with union election campaigns. H. K. Porter, Inc. and United Textile Workers of America, 131 N.L.R.B. 1383 (1961).

¹¹A special subcommittee on labor of the House Committee on Education and Labor is now considering proposed legislation, H.R. 11725, 90th Cong., 1st Sess., designed to make the National Labor Relations Act remedies more effective. And the Board itself is engaged in a study of whether it should more rigorously exercise its existing remedial powers by awarding compensatory pay for delays caused by illegal refusals to bargain. The Trial Examiner in Zinke's Foods, Inc., NLRB Case No. 30-CA-372, proposed such a remedy, while another Examiner recommended against it in Herman Wilson Lumber Co., NLRB Case No. 26-CA-2536. See also Ex-Cell-O Corp., NLRB Case No. 25-CA-2377, and Int. U., United Automobile, etc. Workers of America v. N.L.R.B., Nos. 20,137, 20,185 and 20,301 (appeals pending) where the

When the unfair labor practices are committed in locaities where hostility to the union movement may run deep, the determined employer who litigates charges often succeeds in ousting the union despite the Board's repeated findings of Section 8(a) (5) violations. 12 And the testimony of witnesses at the recently completed hearings of the House subcommittee on NLRB remedies shows that the refusal to bargain in good faith is frequently the last ditch effort of the employer to undermine the union whose organizational effort he had been unable to frustrate. 13

The requirement that a checkoff be granted is at most a minor intrusion on freedom of contract. In a case such as this, the checkoff provision—a provision which is included in 92 per cent of all manufacturing in-

Board, after denying such a remedy, has asked that the cases be remanded for reconsideration of this question. As the Board said in *H. W. Elson Bottling* Co., 155 N.L.R.B. 714, 715 (1965): "The Board has a particular duty under Section 10(c) to tailor its remedies to the unfair labor practices which have occurred * * * ." "This process requires constant reevaluation of the Board's remedial arsenal so that the 'enlightenment gained from experience' can be applied to the 'actualities of industrial relations." *Id.* at 715 n.5.

^{12&}quot;The collective bargaining consequences of a remedied violation depended mainly upon the nature and extent of an employer's original resistance to bargaining and his persistence in delaying compliance. Litigated cases frequently differed from non-litigated cases in fundamental ways and employers who litigated charges often succeeded in ousting their unions." Ross, supra, 63 Lab. Rel. Rep. at 133.

¹³Testimony before the Special Subcommittee on Labor of the House Committee on Education and Labor on H.R. 11725 (1967).

dustries labor contracts¹⁴—is likely to be of life or death import to the fledgling union,¹⁵ while it is of no consequence whatever to the employer.¹⁶ Yet if the Board can do no more than repeatedly order the company to bargain in good faith, the workers' rights to bargain collectively may be nullified. The Board is empowered to see that this does not happen. Where an employer has twice been found to have violated his duty to bargain in good faith, a checkoff in return for a reason-

¹⁴See BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, p. 87:3. Most of the contracts not containing a checkoff provide for some alternative method of dues collection on company property. *Id.* at p. 87:901.

¹⁵In the instant case, the nearest union office was in Roanoke, Virginia, 85 miles from the plant. The employees were scattered over a wide area. As we said in our original opinion, collection of dues without a check-off would have presented the union with a substantial problem of communication and transportation.

^{16&}quot;The check-off is of great consequence to the union, as it avoids the necessity of collecting dues each and every week. It is of small consequence to the employer, especially if the union agrees to bear the additional expenses." Supplemental statement of Frank Thompson, Jr., Chairman, Special Subcommittee on Labor, September 14, 1966, HEARING BEFORE THE SPECIAL SUBCOMMITTE ON EDUCATION AND LABOR, HOUSE OF REPRESENTATIVES, 89 Cong., 2d Sess., p. 77 (1966). In fact, the Subcommittee recommended that the simple refusal to agree to a checkoff paid for by the union should itself be recognized "as a criteria of bad faith bargaining" and "an indication of anti-union animus." Ibid. In the instant case the company admitted that it had no business reason for opposing the checkoff.

able concession by the union¹⁷ may be the only effective remedy. Such a remedy "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' Virginia Elec. & Power Co. v. Labor Board, 319 U.S. 533, 540." Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 216 (1964).

Remanded

Senior Circuit Judge WILBUR K. MILLER dissents.

¹⁷The Board has not undertaken to oversee the reasonableness of the substantive terms of collective bargaining contracts. Nor has it found a breach of the duty to bargain by considering simply the reasonableness of the offers and counteroffers made by the parties. This is as it should be. But as Judge Magruder pointed out: "[I]f the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." N.L.R.B. v. Reed & Prince Mfg. Co., supra Note 3, 205 F.2d at 134. The Board could make a comparable judgment in deciding whether its remedial order that reasonable counter offers be made has been complied with.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,492 SEPTEMBER TERM, 1967

United Steelworkers of America, Petitioner, v. National Labor Relations Board, Respondent.

NO. 19,507

H. K. Porter Company, Inc., Petitioner, v. National Labor Relations Board, Respondent.

Before: BAZELON, Chief Judge, WILBUR K.
MILLER, Senior Circuit Judge and
WRIGHT, Circuit Judge in Chambers.

UNITED STATES COURT OF APPEALS for the District of Columbia Circuit Filed Dec. 8, 1967

> NATHAN J. PAULSON Clerk

Order

On consideration of the motion of United Steelworkers of America, AFL-CIO, for leave to file its lodged motion for reconsideration, it is

ORDERED by the Court that the Clerk is directed to file the lodged motion for reconsideration, the opposition thereto, and the motion requesting oral argument, and on consideration whereof, it is

FURTHER ORDERED by the Court that to the extent of the Court's opinion issued this date the motion to clarify is granted, and this case is remanded to the Board for reconsideration in light of the opinion.

Per Curiam.

Senior Circuit Judge Wilbur K. Miller dissents.

172 NLRB No. 72

D-983 Danville, Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD

H. K. PORTER COMPANY, INC.,
DISSTON DIVISION-DANVILLE WORKS
and
UNITED STEELWORKERS OF AMERICA,

UNITED STEELWORKERS OF AMERICA,
AFL-CIO

Case 5-CA-2785

SUPPLEMENTAL DECISION AND ORDER

On July 9, 1965, the National Labor Relations Board issued its Decision and Order in this case¹ finding that the Respondent had violated Section 8(a)(5) of the National Labor Relations Act, as amended, by failing to bargain in good faith with the Union on the issue of a checkoff provision in the collective-bargaining agreement with the Union. The Board thereupon ordered the Respondent to bargain collectively. On May 19, 1966, the United States Court of Appeals for the District of Columbia enforced the Board's Order.² Pursuant to a motion by the Union, the Court, on December 8, 1967, issued a decision clarifying its earlier decree and remanding the proceeding to the Board.³

The Board in the original decision herein concluded that the real and only reason for refusing the checkoff was to "frustrate agreement with the union" and ordered the Respondent to bargain with the Union. In enforcing that order the Court stated that it was "not necessary to include a specific reference to checkoff in the Board's order." The Court also indicated that in any contempt proceeding instituted in the case it would be able to make a judgment based on the Respondent's performance at the bargaining table.

¹¹⁵³ NLRB 1370.

²United Steelworkers of America v. N.L.R.B.; H. K. Porter Co. v. N.L.R.B., 363 F.2d 272 (C. A. D.C.), cert. denied 385 U.S. 851.

³³⁸⁹ F. 2d 295 (C. A. D.C.).

⁴³⁶³ F. 2d 272 at 276.

In subsequent contract negotiations the parties each urged divergent interpretations of the Court's decree. Briefly stated, the Union interpreted the decree as obligating the Company to agree to a contractual dues-checkoff provision, while the Company construed the decree as requiring it only to discuss the possibility of giving a checkoff or some form thereof and therefore its offer to give the Union space in the payroll office to collect its dues fulfilled its obligation. Thereafter, the Regional Director for Region 5 indicated to the Union that the Respondent had satisfactorily complied with the decree and the Board declined to institute contempt proceedings.

In its decision granting the Union's motion to reconsider an earlier denial of a motion to clarify its enforcement decree, the Court noted the parties' divergent interpretations of the Order, and the subsequent bargaining impasse which had arisen therefrom. It believed, therefore, that "some guidance from the Court with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining is in order."⁵

The Court noted that on two separate occasion the Respondent had been found to have violated Section 8(a) (5) by not making a good-faith effort to reach agreement with the Union.⁶ The Court indicated that "the workers' rights to bargain collectively may be nullified" when a company repeatedly flouts its bargaining obligation, if the Board does no more "than repeatedly

⁵²⁸⁹ F.2d 295 at 298.

⁶The instant case and an earlier unreported Trial Examiner's Decision in Case 5-CA-2344.

order the company to bargain in good faith." The Court thereupon held that in such circumstances the Board may order the company to make "meaningful and reasonable counteroffers, or indeed even to make a concession." Pointing out that the Respondent had conceded that it had no business reason for refusing to grant a checkoff, the Court stated that "it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union" on one of the remaining issues. And "it is possible," added the Court, "that in an appropriate case the Board could simply order the company to grant a checkoff..."

The Court recognized that the Act is grounded on the premise of freedom of contract. However, it also pointed out that Section 8(a)(5) intends to make meaningful the fundamental duty of the employer to bargain with the representative of the employees. When these two concepts are in conflict, the Court further stated, "the Board must seek to devise remedies which will best effectuate the one at least cost to the other."

As Respondent has repeatedly violated Section 8(a)(5) and admittedly had no business reason for opposing the checkoff, and as its only reason for such opposition was to frustrate agreement with the Union, we conclude in accordance with the Court's rationale, that an order to grant checkoff is warranted in the circumstances of this case. To permit Respondent to hold out for some "reasonable concession" by the Union in return for the checkoff requirement would imply that the Respondent is now being ordered to surrender a position that it had legitimately maintained. Such an implication would be contrary to our finding, affirmed

by the Court of Appeals, that Respondent's opposition to granting checkoff was based solely on a desire to thwart the consumation of a collective-bargaining agreement. Accordingly, we shall vacate our initial order in this case and shall direct that Respondent grant a checkoff provision to the Union.

Supplemental Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders the H. K. Porter Company, Inc., Disston Division-Danville Works, Danville, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

- (a) Refusing to bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive collective-bargaining representative of its employees in a unit composed of all production and maintenance employees at its Danville, Virginia, plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in said Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.
- 2. Take the following affirmative action found necessary to effectuate the policies of said Act:

- (a) Upon request bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive representative of the employees in the aforesaid unit, and embody any understanding reached into a signed contract.
- (b) Grant to the Union a contract clause providing for the checkoff of union dues.
- (c) Post at its plant in Danville, Virginia, copies of the notice attached marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 5, shall, after being signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.
- (d) Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C. July 3, 1968.

FRANK W. McCulloch, Chairman John H. Fanning, Member Gerald A. Brown, Member Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

7In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL, upon request, bargain collectively with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of our employees in a unit composed of all production and maintenance employees at our Danville, Virginia, plant, excluding office clerical employees, professional employees, guards, and supervisors, as defined in the National Labor Relations Act, with respect to rates of pay and other terms and conditions of employment, and if an understanding is reached, embody the same into a signed agreement.

WE WILL grant to the Union a contract clause providing for the checkoff of union dues.

WE WILL Not by refusing to bargain collectively with the duly designated representative of our employees, or in any like or related manner, interfere with, restrain, or coerce our employees, in the exercise of their right to self-organization, to form, join, or assist the above-named, or any other labor organization of our employees, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purposes of mutual aid, or to refrain from any or all such activities.

Appendix to Petition.

All our employees are free to become, remain, or refrain from becoming or remaining members of the above named or any other labor organization.

H. K. PORTER COMPANY, INC.
(Employer)
Ву
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Room 1019, Federal Building, Charles Center, Baltimore, Maryland 21201 (Tel. No. 962-2822), if they have any question concerning this notice or compliance with its provision.

Appendix to Petition.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,222 SEPTEMBER TERM. 1968

H. K. Porter Company, Inc.,
Disston Division—Danville Works, Petitioner
v.

National Labor Relations Board, Respondent United Steelworkers of America, AFL-CIO, Intervenor

UNITED STATES COURT OF APPEALS for the District of Columbia Circuit Filed April 22, 1969

NATHAN J. PAULSON Clerk

Petition to review and set aside and cross-petition to enforce an order of the National Labor Relations Board.

Before: BAZELON, Chief Judge, WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT, Circuit Judge.

Order

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside and a cross-petition to enforce an order of the National Labor Relations Board, and was argued by counsel.

This case has been before this court on two prior occasions. See United Steelworkers of America, AFL-CIO v. N.L.R.B., 124 U.S.App.D.C. 143, 363 F. 2d 272,

cert. denied, 385 U.S. 851 (1966); United Steelworkers of America, AFL-CIO v. N.L.R.B., 128 U.S. App. D.C. 344, 389 F. 2d 295 (1967). For the reasons stated in those opinions, as well as in the Board's supplemental decision and order dated July 3, 1968, which is attached as an appendix to this order, it is

ORDERED by the court that the petition for review of the supplemental decision and order of the Board dated July 3, 1968, be, and the same is hereby, denied, and the Board's order is hereby enforced.

Per Curiam.

Senior Circuit Judge WILBUR K. MILLER dissents.

Excerpts From National Labor Relations Act.

The following portions of the National Labor Relations Act are involved in this case:

Section 8(a)

"It shall be an unfair labor practice for an employer —

"(5) to refuse to bargain collectively with the representatives of his employees"

Section 8(d)

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession"

Section 10(c)

"The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such per-

son to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: ..."





FILE COLT

No. 1516 230

Office-Supreme Court, FILED

11 1969

IN THE

JOHN F. DAVIS, CLERI

Supreme Court of the United States

October Term, 1968

H. K. FORTER COMPANY, INC.,
DISSTON DIVISION—DANVILLE WORKS,
Petitioner

v

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO, IN OPPOSITION

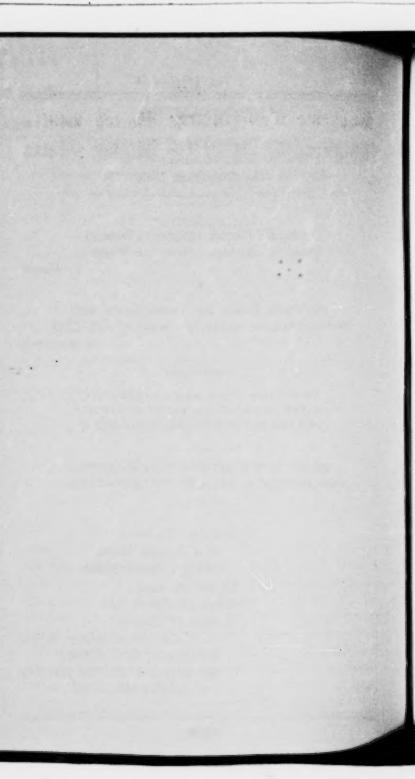
BERNARD KLEMAN

10 S. LaSalle Street
Chicago, Illinois 60603

ELLIOT BREDHOFF
MICHAEL GOTTESMAN
GEORGE H. COHEN

1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for United Steelworkers
of America, AFL-CIO



IN THE

Supreme Court of the United States

October Term, 1968

No. 1516

H. K. PORTER COMPANY, INC.,
DISSTON DIVISION—DANVILLE WORKS,

Petitioner

V.

NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO, IN OPPOSITION

COUNTER-STATEMENT OF THE OUESTION PRESENTED

Does the Board have power to order an employer to agree to a union's request for the checkoff of union dues in the following circumstances: the employer had repeatedly bargained in bad faith with the union and had thereby avoided entering into a collective bargaining agreement for several years; one of the employer's acts of bad faith was refusing the union's checkoff request for the purpose of frustrating agreement and undermining the union; the employer admitted that, except for this purpose (which the Board found unlawful), it had no objection to the union's request; nevertheless, after the Board found the employer's purpose unlawful, the employer continued to refuse the union's request, offering no reason for its continued resistance.

COUNTER-STATEMENT OF THE CASE

Petitioner ("the Company") seeks review by this Court of the propriety of a remedy issued by the Board and enforced by the court below. The Company heretofore sought review of the underlying finding of violation for which this remedy was provided, but this Court denied certiorari, 385 U.S. 851 (1966).

The petition does not describe the violation for which the challenged remedy was provided. We believe the remedy cannot properly be assessed without an understanding of the violation it was designed to cure.

The Union, which was the charging party before the Board, was certified as the bargaining representative of the production and maintenance employees of the Company's Danville, Virginia plant on October 5, 1961. Several years of bargaining ensued, in which the Company repeatedly bargained in bad faith, and in which the Union was unable to secure a contract. Throughout the bargaining, a key issue was the Union's request for a "checkoff" clause, i.e., an agreement by the Company that it would deduct union dues from the wages of those employees who voluntarily authorized such deductions pursuant to Section 302 of the Labor Management Relations Act (hereinafter "the Act"), 29 U.S.C. § 186. The Company consistently and adamantly refused to agree to this request.

In its meetings with the Union, the Company gave only one reason for its refusal to agree to the checkoff—that the collection of union dues is "union business." (J.A. 16, 28). At the hearing before the Board, the Company explained that "we were not going to aid and comfort the International Union at this location" (J.A. 34, 31, 35), and its counsel acknowledged that "our refusal to grant the checkoff clause has been harassment of the International Union." (J.A. 11).

¹ The history of bargaining and of findings of bad faith is recounted in the opinion of the court below (Petition, Appendix, pp. 15-18).

The Company admitted at the hearing that it has made deductions from employees' wages at their request for other purposes, including the purchase of United States Savings Bonds, the purchase of optional insurance coverage for employees' dependents, contributions to the United Fund, and contributions to a so-called "Good Neighbor Fund" (which was administered by the employees, prior to their unionization, for parties, charitable donations, gifts to employees who were hospitalized or who suffered a loss in the family, etc.). None of these deductions is required by law. (J.A. 25, 27, 44).

The Company also admitted that there would be no inconvenience involved in checking off union dues (J.A. 28), and that in fact it does check off union dues at some of its other plants (J.A. 32).

Finally, the Company admitted that it had no objection to the Union's request for checkoff except its unwillingness to give "aid and comfort" to the Union (J.A. 27-28, 29-31, 35). As the Company's attorney put it in his closing argument to the Trial Examiner (J.A. 35):

"[W]e have stated our purpose; we have stated it plainly here many times, that our purpose in denying checkoff was that we were not going to aid and comfort the union . . ."

The Trial Examiner found that the Company had engaged in bad-faith bargaining in violation of Sections 8(a) (5) and (1) of the Act. (J.A. 48-51). He concluded from all the evidence that the Company's sole reason for refusing the checkoff was to "frustrate agreement with the Union." (J.A. 49). The Company's explanation for its position—that it did not wish to give aid and comfort to the Union—was held by the Trial Examiner to "evidence an attitude inconsistent with the obligation imposed . . . by

the Act" to bargain in good faith and with a sincere desire to reach agreement (Ibid). As a remedy, the Trial Examiner simply ordered the Company to bargain in good faith. The Board issued a "short form" decision affirming the Trial Examiner in all respects. The Court of Appeals enforced the Board's order, and specifically affirmed that "it is clear from the record that the Company had no reason. other than to frustrate the bargaining procedure, to refuse to accept the dues checkoff." 363 F.2d 272, 276 (D.C. Cir., 1966). In its opinion, the court interpreted the Board's order as requiring the Company to withdraw its resistance to the Union's checkoff request, for "to suggest that in further bargaining the Company may refuse a checkoff for some other reason not heretofore advanced, makes a mockery of the collective bargaining required by the statute." 363 F.2d 272, 276, n. 16. This Court denied certiorari, 385 U.S. 851 (1966).

Thereafter, in subsequent bargaining, the Company continued to refuse the Union's checkoff request. The Company offered no reason for its refusal, simply stating that it did not construe the Board's order as requiring that it agree to the request. There eventuated another round of legal proceedings, culminating in the Board's supplemental order, enforced below, expressly requiring the Company to agree to a checkoff clause.

ARGUMENT

The Company attempts to paint a conflict between the Board's order in this case and Section 8(d) of the Act as interpreted by this Court.² As the court below cogently

² NLRB v. American National Ins. Co., 343 U.S. 395, 404 (1952); NLRB v. Insurance Agents' International Union, 361 U.S. 477, 486-87 (1960).

demonstrated, there is no such conflict. Accordingly, this case is not worthy of review by this Court.

Section 8(a)(5) imposes upon employers the substantive duty to bargain in good faith. Section 8(d) defines that duty. As part of its definition, Section 8(d) provides that "such obligation does not compel either party to agree to a proposal or require the making of a concession."

Section 8(d) relates to the question of whether an employer has bargained in bad faith, not to the remedy which should flow if he has. The quoted portion of 8(d) was enacted to prevent the Board from insisting that an employer abandon a position maintained in good faith merely because, in the Board's view, the position is "unreasonable, or unfair, or impractical, or unsound." NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (1960). For example, in NLRB v. American National Ins. Co., 343 U.S. 395 (1952), this Court reversed a Board decision finding an employer in bad faith solely because a "management rights" clause insisted upon by the employer was, in the Board's view, too broad.

In the instant case, the Board's underlying finding of violation was not premised on any notion that employers may not refuse checkoff requests, but rather on a finding that this employer was unlawfully motivated in refusing the request. That factual finding was affirmed by the court below in its initial decision, 363 F.2d 272, and this Court denied certiorari, 385 U.S. 851 (1966). The issue now advanced to this Court relates to the remedy which the Board may provide for this properly-found violation. Section 8(d) is not addressed to the Board's remedial powers. It is Section 10(c) which defines the Board's power in fashioning remedies, and Section 10(c) mandates the Board, without restriction, to order a violator "to take such affirmative action . . . as will effectuate the policies of the Act." As the court below recognized, there is nothing in

Section 10(c), nor in any of the decided cases, which precludes the type of remedy ordered here.

Indeed, any other result would render the Act's bargaining obligation a nullity. After the initial Board order was enforced, the Company was left admittedly with no objection to the Union's checkoff request. Nevertheless, it continued to refuse to grant the request, offering no reason at all for its refusal. Of what value is Section 8(a)(5) if, after bad faith has been found, the employer may respond by silent, unexplained refusal to proceed further? This Court has recognized that good faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreement." NLRB v. Insurance Agents, 361 U.S. 477, 485 (1960). The Board's remedy in this case—requiring a recidivist bad-faith employer who lacks a lawful objection to a union request to grant that request—effectuates this policy of the Act.

Even if Section 8(d) related to remedy—and we have shown above that it does not—it would not preclude the Board's order in this case. The refusal to make concessions cannot be used "as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail." NLRB v. Herman Sausage Co., supra, at 231. Rather, this provision of Section 8(d) means only that an employer need not yield "positions fairly maintained." Ibid. Where, as here, an employer has no objection to a union proposal, or has only an unlawful objection, this provision of Section 8(d) is inapplicable. The employer who has no objection to a union proposal makes no "concession" when he incorporates that proposal into a collective bargaining agreement.

The order entered in this case conflicts with no decision of any court, and raises no issue worthy of review by this Court.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be denied.

Respectfully submitted,

BERNARD KLEIMAN
10 S. LaSalle Street
Chicago, Illinois 60603
ELLIOT BREDHOFF
MICHAEL GOTTESMAN

George H. Cohen 1001 Connecticut Avenue, N. W. Washington, D. C. 20036

Attorneys for United Steelworkers of America, AFL-CIO Miscellaneous: Forced Concerding of Possible NLRB Remedy, 68 Column L. Hev. 1 the (1936)

INDEX

Opinions below	F
Inidiction	
Question presented	
Statute involved	
Statement:	
A. The earlier proceedings	
B. The present proceeding.	
Arrument	
Angusion	
Conclusion	
CITATIONS	
Chares:	
Fibreboard Paper Products Corp. v. National Labor	
Relations Board, 379 U.S. 203	
National Labor Relations Board v. American Aggre-	
gate Co., 335 F. 2d 253	
National Labor Relations Board v. C & C Plywood	
Corp., 385 U.S. 421	
National Labor Relations Board v. Gissel Packing Co.,	
Nos. 573, et al., Oct. Term, 1968, decided June 16,	
1969, slip opinion, pp. 32–33	
National Labor Relations Board v. Insurance Agents'	
International Union, 361 U.S. 477	
National Labor Relations Board v. Lewin-Mathes Co.,	
285 F. 2d 329	
National Labor Relations Board v. United Clay Mines	
Corp., 219 F. 2d 120	
Retail Clerks International Ass'n v. National Labor	
Relations Board, 373 F. 2d 655	
Statutes:	
National Labor Relations Act, as amended (61 Stat.	
136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.):	
Section 8(a) (5	
Section 8(d)	8
Section 10(c)	•

Miscellaneous:

Forced Concession as a Possible NLRB Remedy, 68
Colum. L. Rev. 1192 (1968)

marijana

the state of the s

14 2 17 2 17 9

in the state of th

Video Int. of the Late of It & Parent

V Kennet P. W. Company of the Compan

Some Change Start Fred Level 1 to the Control of th

In the Supreme Court of the United States

Whether, upon 6961; MarTi areono lover's refusal to more to the union's request for a contract provision

for the checkoff of much No. 230 in to floatends out not

H. K. PORTER COMPANY, INC., DISSTON DIVISION— DANVILLE WORKS, PETITIONER

NATIONAL LABOR RELATIONS BOARD AND UNITED STEEL-WORKERS OF AMERICA, AFL-CIO

The relation brovisions

ON PETITION FOR A WRIT OF CERTIONARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN

OPINIONS BELOW

The court of appeals rendered no opinion in enforcing the Board's supplemental order. The earlier opinions of the court of appeals are reported at 363 F. 2d 272 (certiorari denied, 385 U.S. 851), and 389 F. 2d 295 (Pet. App. 14-31). The Board's decisions and orders are reported at 172 NLRB 72 (Pet. App. 31-38) and 153 NLRB 1370.

raion while insitin norrowant estrice charge, and

The judgment of the court of appeals (Pet. App. 39-40) was entered on April 22, 1969. The petition for

a writ of certiorari was filed on June 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. In the Supreme Court of the United

Whether, upon finding that the employer's refusal to agree to the union's request-for a contract provision for the checkoff of union dues was not in good faith but solely to frustrate an agreement with the union. the National Labor Relations Board properly ordered the employer to grant such a provision as a remedy for the unfair labor practice.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519. 29 U.S.C. 151, et seq.), are set forth in the Appendix to the petition, pp. 41-42.

BRIEF FOR THE HATION STATEMENT

FLATIONS BOARD IN

A. THE EARLIER PROCEEDINGS

In the fall of 1961, the Union '-which had just been certified as the representative of the employees at the Company's Danville, Virginia, plant-commenced contract negotiations with the Company. The parties met 28 times but failed to reach agreement. Upon charges filed by the Union, the Board found that the Company had failed to bargain in good faith by, inter alia, refusing to agree to an arbitration provision while insiting upon a no-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times. The Board or-

¹ The United Steelworkers of America, AFL-CIO.

dered the Company to cease its illegal conduct and to bargain in good faith. On July 17, 1964, the Court of Appeals for the Fourth Circuit summarily enforced the Board's order (J.A. 46).

Meanwhile, negotiations had resumed in October 1963. Twenty-one meetings were held between that date and September 10, 1964, when negotiations again ceased without an agreement (J.A. 47; 13-14, 44). When negotiations broke off, the issues left unresolved were wages, insurance, and the Union's request for a deduction of Union dues by the Company from employees' paychecks ("checkoff") (J.A. 47; 14-15). The dues checkoff was discussed at virtually every bargaining session, and each time the Company refused the Union's request, claiming that collection of dues was the "union's business" (J.A. 47; 17, 27-28). Although the Union offered to withdraw its checkoff request if the Company would permit the Union to collect dues during non-working hours in non-working areas of the plant, the Company also rejected this alternative proposal on the ground that it refused "to aid and comfort the International at this location" (J.A. 47; 16-17, 29-30, 33-35). The Union again filed unfair labor practice charges with the Board.

At the Board hearing, the chief negotiator for the Company admitted that the refusal of a checkoff was not based on "inconvenience to the Company," since it regularly made payroll deductions for Savings Bonds, Insurance, United Givers Fund, and a "Good Neighbor Fund" (J.A. 48; 25–28, 44). He also stated

^{2&}quot;J.A." refers to the Joint Appendix to the briefs below.

that the Company had no policy against checkoffs, and that it had agreed to checkoff provisions with unions at some of its other plants (J.A. 48; 25, 28).

The Board concluded that the Company had feiled to bargain in good faith about the dues checkoff adopting the trial examiner's finding that the Company's intransigent position was motivated by a desire to frustrate agreement with the Union (J.A. 49-51. 58). The Board again ordered the Company to cease and desist from the unfair labor practice found and to bargain collectively with the Union upon request (J.A. 52-53, 58-59). In May 1966, the Court of Appeals for the District of Columbia Circuit' sustained the Board's unfair labor practice finding, and enforced its order. 363 F. 2d 272. The court found that it was not necessary for the order to include a specific reference to checkoff, stating that, in view of the finding that the Company's refusal was for the purpose of frustrating agreement with the Union, "[t]o suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (363 F. 2d at 276, n. 16). This Court denied the Company's petition for a writ of certiorari, 385 U.S. 851.

B. THE PRESENT PROCEEDING

When the contract negotiations were resumed, each side urged a different interpretation of the court of appeals' decree. The Company contended that the de-

Judge Wilbur K. Miller dissented from this and the subsequent decisions of the court of appeals in this case.

eree left it free to continue to refuse a checkoff provision provided it was willing to bargain about alternative methods of dues collection. The Union, on the other hand, asserted that the Company was obligated to agree to such a provision (Pet. App. 17–18).

In February 1967, the Union moved in the court of appeals for clarification of the enforcement decree (Pet. App. 18-19). The court initially denied the motion, suggesting that contempt proceedings would be appropriate to test the Company's compliance with the decree (Pet. 6; Pet. App. 18). When the Board declined to institute contempt proceedings, the court granted the Union's renewed motion, and remanded the case to the Board for reconsideration of its order in light of the principles announced in the court's epinion. The court stated that it did not read "Section 8(d) as prohibiting the Board from ordering a company, which has repeatedly flouted its Section 8(a)(5) duty, to make meaningful and reasonable counteroffers, or indeed even to make a concession where such counteroffers or such a concession would be the only way for the company to purge the stain of bad faith that has already soiled its position" (Pet. App. 21). The court pointed out that, "[s]ince the company had conceded that it had no business reason for refusing the checkoff, it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union on wages or insurance—the two issues besides checkoff that remained in dispute. Indeed, it is possible that in an appropriate case the Board could simply order the company to grant a checkoff" (Pet. App. 22).

On remand, the Board concluded in accordance with the court's rationale that an order requiring the Company to grant a checkoff was warranted in the circumstances of this case (Pet. App. 34). The Board determined that, in light of the unlawful purpose of the Company's refusal to agree to a checkoff provision, the Company should not be permitted to persist in its refusal in order to extract concessions from the Union on other issues (*ibid.*). Accordingly, the Board entered a supplemental order which included a requirement to grant a checkoff (Pet. App. 35-36). The court of appeals enforced that order (Pet. App. 39-40).

ARGUMENT TO THE

1. The facts summarized above show that on two separate occasions the Company failed to bargain in good faith with the Union. In the second unfair labor practice proceeding, the Board found and the court of appeals agreed that the Company's refusal to grant a checkoff was not based on legitimate business considerations, but was solely "for the purpose of frustrating agreement with the union * * *" (Pet. App. 17). The sole question presented is whether, in these unique circumstances, the Act empowers the Board, as a remedy for the Company's continuing refusal to bargain in good faith, to direct the inclusion of a checkoff provision in any agreement reached between the Company and Union. We submit that the court below correctly answered this narrow question in the affirmative.

As petitioner recognizes (Pet. 8-9), Section 10(c) of the Act empowers the Board, upon finding that an unfair labor practice has been committed, to require the employer to "take such affirmative action " ... as will effectuate the policies of the Act." And, as this Court stated in Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, the "Board's power is a broad discretionary one, subject to limited judicial review," and the "Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act'" (id. at 216). The Board's remedy in this case is within these limits. Since the Company's refusal to grant a checkoff was motivated solely by a desire to frustrate agreement with the Union, the court below correctly observed that "to permit the company to refuse a checkoff for some concocted reason not heretofore advanced would make a mockery of the collective bargaining required by the statute" (Pet. App. 17). In these circumstances, the Board could reasonably conclude that the effects of the Company's prior refusal to bargain could be fully eradicated only by requiring that it now grant the Union a checkoff provision. As the court below said, "if the Board can do no more than repeatedly order the company to bargain in good faith, the workers'

[&]quot;As this Court recently observed in an analogous situation: "If the Board could enter only a cease-and-desist order and direct an election * * * it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain' * * *. The employer could continue to delay * * * and put off indefinitely his obligation to bargain * * ." National Labor Relations Board v. Gissel Packing Co., Nos. 573, et al., Oct. Term, 1968, decided June 16, 1969, slip opinion, pp. 32-33.

rights to bargain collectively may be multified The Board is empowered to see that this does not happened (Pet. App. 28). The out to selected out a standard flow as

2. Contrary to petitioner's contention (Pet 941) the Board's order does not violate the provision in Section 8(d) of the Act that the obligation to barrain in good faith "does not compel either party to arrea to a proposal or require the making of a concession" As the court below pointed out (Pet. App. 21), See tion 8(d) relates to "whether a Section 8(a) 1(5) violation tion has occurred and not to the scope of the remede which may be necessary to cure violations which have already occurred." Once the failure to bargain in good faith has been determined, the formulation of an order to remedy the effects of the unfair labor practice is governed by the policies which underlie Section 10(c) of the Act. The remedial order in this case did not interfere with any freedom to contract protected by the Act. As the Board correctly observed on remand (Pet. App. 34-35):

To permit Respondent to hold out for some "reasonable concession" by the Union in return for the checkoff requirement would imply that the Respondent is now being ordered to surrender a position that it had legitimately maintained. Such an implication would be contrary to our finding, affirmed by the court of appeals, that Respondent's opposition to granting checkoff was based solely on a desire to thwart the consummation of a collective-bargaining agreement.

National Labor Relations Board v. Insurance Agents' International Union, 361 U.S. 477, is fully consistent with this analysis. As this Court there pointed out, Section 8(d) was designed to insure that the Board would not weigh the merits of each party's proposals, offers, or counteroffers in determining whether the bargaining was in good faith (id., at 486-487). The Board in this case did not engage in the forbidden task of assessing the merits of the parties' substantive proposals; it merely determined what action was necessary to remedy the Company's unlawful refusal to bargain, Cf. National Labor Relations Board v. C & C Plywood Corp., 385 U.S. 421, 427. And see Forced Concession as a Possible NLRB Remedy, 68 Colum. L. Rev. 1192 (1968). That the Company is required to make a concession concerning checkoff is not attributable to any judgment by the Board that a checkoff is beneficial in this particular labor-management relationship, but rather to the fact that the Company's prior bad faith bargaining on that issue could be fully eradicated only by such remedy.5

The other cases cited by petitioner (Pet. 11) are also in-apposite. National Labor Relations Board v. American Aggregate Co., 335 F. 2d 253 (C.A. 5), National Labor Relations Board v. Lewin-Mathes Co., 285 F. 2d 329 (C.A. 7), and National Labor Relations Board v. United Clay Mines Corp., 219 F. 2d 120 (C.A. 6) all involve the evidentiary determination whether an employer's bargaining was in bad faith. Retail Clerks International Ass'n v. National Labor Relations Board, 373 F. 2d 655 (C.A. D.C.), involved the factual question whether an agreement had been reached by the employer and union.

distent with this worstrano As this Court there

petition for a writ of certiorari should Board would not weigh the monts of each party

Respectfully submitted.

Solicitor General

ARNOLD ORDMAN. General Counsel, rom ti : shadogong avituataha DOMINICK L. MANOIL, Aparter of Transcribed Naw and

Associate General Counsel,

NORMAN J. COME, COME, COME

Assistant General Counsel,

JOHN I. TAXLOR, OH Column I. Rev. 110, Rolling St. Johnson Attorney.

> National Labor Relations Board, and ing energical to bot at landble to an

August 1969. Hanne si florischen mit bradt sell fierler tabor-management relationship, but rather

ing on that is one could be built oradiest it adv by such

permitty Validate Labor Polation Plant & American Law parts Co., Sha F. no was (CA. 5). Indeed Board'v. Lamin Vactors Com and P. St. 329 at A. 74, and N. Similar Landon Time thereof a land of the Many Corner Silve

placing an amoly bereating up to bed faith. Redail Clerks International day'r y Trained Labor Policion Propel

stather an agreement had been reached by the cardover and

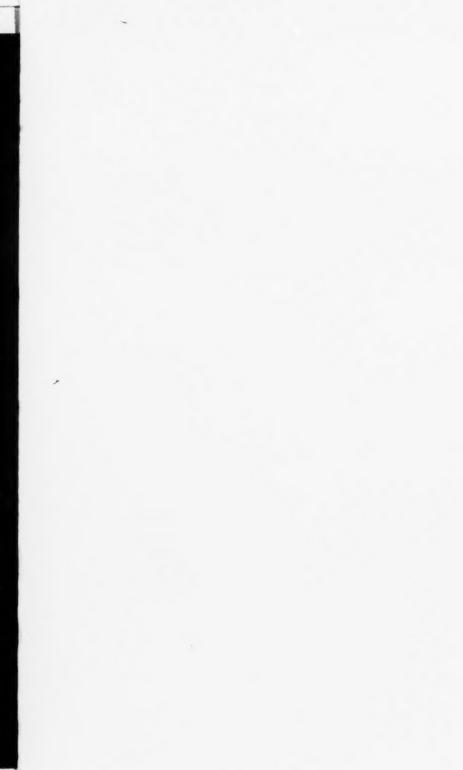
ERWIN N. GRISWOLD died

the fact that the Company's prior bad faith bereating

vioenier.

All the sales of the period and a self-the

sequenting the A track of the production of the production 10 1 468 69- 36 688



Supreme Court of the United States

OCTOBER TERM, 1969

NO. 230

H. K. PORTER COMPANY, INC.
DISSTON DIVISION — DANVILLE WORKS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, and

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents

REPLY BRIEF FOR PETITIONER

The Company is reluctant to burden this Court with a factual issue which has no direct bearing on the pure, legal question presented by the Company's petition, namely, whether the Board has the power to order a party to agree to a substantive provision of a collective bargaining agreement. However, the Company must call the Court's attention to an important misstatement of fact contained in the Union's Brief in Opposition to the Company's petition. At pages 1 and 4 of the Union's Brief it is contended that after the District of Columbia Court of Appeals' original opinion enforcing the Board's bargaining order (363 F. 2d 272), the Company "continued to refuse the union's [check-off] request, offering no reason for its continued resistance", and that the "Company offered no reason for its refusal, simply stating that it did not construe the Board's order as requiring that it agree to the request." Again, on page 6 of the Union's Brief, this question is asked of the Court: "Of what value is Section 8(a) (5) if, after bad faith has been found, the employer may respond by silent, unexplained refusal to proceed further?" (Emphasis added).

The effect of these misstatements is to depict the Company as openly defying an order of the Board as enforced by the Court of Appeals by continuing to maintain without explanation a position previously found by the Court of Appeals to be unlawful. This is simply not true.

There is little question that under the language of the Court of Appeals' original opinion the Company, after further bargaining, would have been required to make some kind of concession with respect to the Union's demand for check-off in order to avoid contempt proceedings; but it is equally clear that the Court of Appeals did not require that such a concession be made outright, without further bargaining. Thus, the Court of Appeals stated at 363 F.2d 276:

"... it is not necessary to include a specific reference to the check-off in the Board's order.... In any contempt proceeding, the record made before the Board in both Section 10(b) proceedings will be available to this court. Thus we will be in a position to make a judgment based not only on the Board's order, but on the entire record of this company's performance at the bargaining table." (Emphasis added).

Notwithstanding this clear wording by the Court of Appeals, the Union insisted that the Court of Ap-

peals' decision required the Company to make an outright gift of a dues check-off provision without any bargaining at all (App. pp. 17-18).

By taking this position, the Union itself precluded further bargaining, for the Union had rejected in advance any attempt by the Company to negotiate over alternative methods of dues collection or, if check-off were ultimately agreed upon, to ask for something in return. That the Company's interpretation of the Court of Appeals' opinion was correct and was held in good faith was recognized by the Board when it declined the Union's request for a contempt proceeding and closed the case on the ground that the Company was in compliance with the Board's order as enforced by the Court of Appeals.

Despite this uncontradicted factual background, the Union in its brief attempts to depict the Company as continuing to ignore its duty to bargain even after the clear directive from the Court of Appeals and thus seeks to discredit the Company in the eyes of this Court and to provide a basis for its argument that the present order is necessary to effectuate the policies of the Act. The inference is made that the order to bargain over check-off became inadequate when the Company refused to grant outright a provision for dues check-off, and that therefore the policy of the Act as clearly expressed in Section 8(d) should not prevent the Board from fashioning an adequate remedy.

The record in this case supplies no support whatsoever for the inference on which this argument is based. Because of the Union's insistence that the order required the Company to agree outright to a dues checkoff provision, the order was never really tested at the bargaining table.

The Court of Appeals below recognized that "the National Labor Relations Act is grounded on the premise of freedom of contract" by which the "substantive terms of the collective agreement are to be forged by the parties to it, not by the Board", and that "remedies which impinge on it are not to be casually undertaken", (389 F. 2d 295, 300). The Union and the Board contend that the "unique" circumstances of this case justify the imposition of such a remedy.

The Company submits that Congress in its wisdom has withheld from the Board the power to compel agreement under any circumstances whatsoever, and that the circumstances of this case serve only to demonstrate the wisdom of that policy.

Petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

Donald C. Winson 1000 Porter Building Pittsburgh, Pennsylvania 15219 Counsel for Petitioner

PAUL R. OBERT
THOMAS P. LUSCHER
1500 Porter Building
Pittsburgh, Pennsylvania 15219

WM. ALVAH STEWART
ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Of Counsel

UNIT

ON V

PAUI THO: 15

Pi Wm.

ECK 10 Pi



t the

"the mise erms par-hich (389 that

reethat rate

tion

5219 oner

2 194

FILE COPY

IN THE

FILED

NOV 28 1969

Supreme Court of the United States, CLERK

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC. DISSTON DIVISION-DANVILLE WORKS, Petitioner,

y.

NATIONAL LABOR RELATIONS BOARD

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

DONALD C. WINSON 1000 Porter Building Pittsburgh, Pennsylvania 15219 Counsel for Petitioner

PAUL R. OBERT THOMAS P. LUSCHER 1500 Porter Building Pittsburgh, Pennsylvania 15219

WM. ALVAH STEWART ECKERT, SEAMANS & CHERIN 1000 Porter Building Pittsburgh, Pennsylvania 15219 Of Counsel

> Petition for Certiorari Filed June 13, 1969 Certiorari Granted October 13, 1969



INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Statute involved	2
Question presented	3
Statement of the case	4
Argument	11
Conclusion	27
TABLE OF CITATIONS	
CASES	
Cooper Thermometer Co. v. NLRB, 376 F.2d 684 (2d Cir. 1967)	17
Intercity Petroleum Marketers, Inc., 173 NLRB No. 222 (1968)	16
Kroger Co. v. NLRB, 401 F.2d 682 (6th Cir. 1968)	23
Local 57, Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir.), cert. denied, 387 U.S. 942 (1967)	23
Local 60, Carpenters v. NLRB, 365 U. S. 651 (1961) 2	2, 23
May Stores Co. v. NLRB, 326 U. S. 376 (1945)	21
NLRB v. American Aggregate Co., 335 F.2d 253 (5th Cir. 1964)	17
NLRB v. American National Ins. Co., 343 U. S. 395 (1952)	8, 19
NLRB v. Insurance Agents' International Union, 361 U. S. 477 (1960) 14-15, 18, 19, 2	
NLRB v Jones & Laughlin Steel Corp., 301 U. S. 1 (1937)	13
NLRB v. Lewin-Mathes Co., 285 F.2d 329 (7th Cir. 1960)	17

Table of Citations.

CASES	AGE
NLRB v. Triangle Plastics, Inc., 166 NLRB No. 86 (1967), enforced, 406 F.2d 1100 (6th Cir. 1969)	wi
NLRB v. United Clay Mines Corp., 219 F.2d 120 (6th Cir. 1955)	17
Phelps Dodge Corp. v. NLRB, 313 U. S. 177 (1941)	22
Republic Steel Corp. v. NLRB, 311 U. S. 7 (1940)	22
Retail Clerks International Association v. NLRB, 373 F.2d 655 (D.C. Cir. 1967)	
J. P. Stevens & Co. v. NLRB, 380 F.2d 292 (2d Cir.), cert. denied, 389 U. S. 1005 (1967)	23
United Aircraft Corp., 168 NLRB No. 66 (1967), enforcement denied on other grounds, sub. nom. Machinists v. NLRB, —F.2d—, 60 CCH LC ¶10,118 (D. C. Cir. 1969)	16
United Steelworkers of America v. NLRB, 390 F. 2d 846 (D.C. Cir. 1967), cert. denied, 391 U. S. 904 (1968)	5, 26
STATUTES	
National Labor Relations Act, 61 Stat. 136,73 Stat. 519, 29 U.S.C. § 151, et seq.:	
§8 (a) (5)2-3	3, 11
§8 (d)3, 12, 18	3, 27
§10 (c)3	, 12
MISCELLANEOUS	
79 Congressional Record 2371	21
Cox, The Labor Management Relations Act, 61 Harv. L. Rev. 1 (1947)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC. DISSTON DIVISION-DANVILLE WORKS, Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD and

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents,

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The original decision and order of the National Labor Relations Board issued July 9, 1965 are reported at 153 NLRB 1370 (1965) (A. 43-56).* The opinion by the United States Court of Appeals for the District of Columbia Circuit which accompanied its order of May 19, 1966 enforcing the Board's original decision and order is reported at 363 F.2d 272 (D.C. Cir.), cert. denied, 385 U.S. 851 (1966) (A. 57). The clarifying opin-

^{*}The abbreviation "A." refers to the single appendix to the briefs of the parties.

ion by the Court of Appeals which accompanied its order of December 8, 1967 remanding this case to the Board is reported at 389 F.2d 295 (D.C. Cir. 1967) (A. 114). The supplemental decision and order of the Board issued July 3, 1968 on remand, are reported at 172 NLRB No. 72 (1968) (A. 132). The per curiam order dated April 22, 1969 by which the Court of Appeals enforced the supplemental decision and order of the Board is reported at 414 F.2d 1123 (D.C. Cir. 1969) (A. 140).

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit which is before this Court for review on writ of certiorari was entered on April 22, 1969 (A. 140). The petition for writ of certiorari was filed with this Court on June 13, 1969 (A. 5), and was granted on October 13, 1969 (A. 142) (38 U.S. Law Week 3127). The jurisdiction of this Court is conferred under the provisions of 28 U.S.C. §1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, et seq.), which are involved in this case are set forth below.

Section 8(a)

"It shall be an unfair labor practice for an employer—

Question Presented.

"(5) to refuse to bargain collectively with the representatives of his employees"

Section 8(d)

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession"

Section 10(c)

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . ."

QUESTION PRESENTED

The question presented is whether under the National Labor Relations Act the National Labor Relations Board has the power to order a party to agree to a substantive provision of a collective bargaining agreement.

STATEMENT OF THE CASE

The order of the United States Court of Appeals for the District of Columbia Circuit which is before this Court for review enforced, with one judge dissenting, a supplemental order of the National Labor Relations Board requiring the Petitioner to take the following affirmative action:

"Grant to the Union a contract clause providing for the checkoff of union dues" (A. 137).

H. K. Porter Company, Inc., Disston Division — Danville Works (hereinafter referred to as the "Company" or "Petitioner") contends that the National Labor Relations Board (hereinafter referred to as the "Board") does not have the power under the National Labor Relations Act to order the Company to agree to such a contract clause or to any other substantive provision of a collective bargaining agreement.

This case initially arose from negotiations between the Company and the United Steelworkers of America, AFL-CIO (hereinafter referred to as the "Union") for a collective bargaining agreement at the Company's plant in Danville, Virginia (A. 46). These negotiations took place from October 23, 1963 to September 10, 1964 and consisted of twenty-one bargaining sessions in which the unresolved contract issues were reduced from fourteen to three, the three open issues being wages, insurance and a provision for the collection of union dues. (A. 46). During these bargaining sessions, the Union insisted that any contract between the parties had to contain a provision for the collection of union dues, and the Company refused to accede to the Urion's demand (A. 47).

The Union filed an unfair labor practice charge which resulted in the issuance of a complaint accusing the Company of having bargained in bad faith "by, inter alia, adamantly rejecting the Union's proposal for a provision for the deduction of Union dues" (A. 11).

After a hearing, the Trial Examiner issued a decision in which he held that the Company had refused the Union's demand for a dues check-off provision for the purpose of frustrating an agreement with the Union and thus had engaged in bad faith bargaining in violations of Sections 8(a) (5) and (1) of the National Labor Relations Act* (A. 49-51).

The Trial Examiner's recommended order was that the Company cease and desist from refusing to bargain collectively with the Union and, affirmatively, that the Company bargain collectively with the Union.

^{*}As set forth in his decision, the Trial Examiner's bases for concluding that the Company's position with respect to a dues check-off provision was taken for the purpose of frustrating an agreement with the Union, were that the Company negotiator had an anti-union animus in a prior unfair labor practice proceeding and his "demeanor" as a witness in the present case showed that his attitude had not changed; that the Company negotiator's reason for refusing to agree to a dues check-off provision ("that he did not wish to give aid and comfort to the Union by assisting it in collecting dues") evidenced an attitude inconsistent with the Company's bargaining obligation under the National Labor Relations Act; and that the Company's reliance upon the relative economic strength of the parties in refusing to agree to a dues check-off provision ran counter to the objectives of the Act and demonstrated a purpose of forestalling agreement by disparaging the Union in the eyes of the employees (A. 49-51).

With regard to the effect of this recommended order, the Trial Examiner stated:

"This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled." (A. 51).

On July 9, 1965, the Board, without a separate opinion of its own on the merits, issued a decision and order adopting the Trial Examiner's findings, conclusions and recommended order (A. 55).

The Union then filed in the United States Court of Appeals for the District of Columbia Circuit a petition to review the Board's original decision and order. In its petition, the Union contended that the Board had erred in not ordering the Company to agree to a contract clause providing for the check-off of union dues (A. 64). The Company also filed a petition to review the Board's finding that the Company had bargained in bad faith (A. 1). The Board filed a cross-application for enforcement of its order (A. 1).

On May 19, 1966, the Court of Appeals (with a strong dissent by Senior Circuit Judge Miller*) affirmed

^{*}Judge Miller stated in his dissenting opinion that he had "seldom seen a record so barren of support for the decision of the examiner and the Board. . . ." (A. 78).

and enforced the Board's original decision and order* (A. 57). 363 F.2d 272 (D.C. Cir.), cert. denied, 385 U.S. 851 (1966).

Although, in affirming the Board's order, the Court rejected the Union's request that the Company be specifically ordered to agree to a dues check-off provision, the Court ruled that the Trial Examiner's comment in his decision (quoted at p. 6 supra), to the effect that his recommended bargaining order would require the Company to bargain in good faith but would not require it to agree to check-off, should be disregarded. On this point, the Court stated (A. 66-67):

"This . . . is inconsistent with the trial examiner's finding that the company's refusal to grant a check-off was 'for the purpose of frustrating agreement with the Union. . . .' To suggest that in further bargaining the company may refuse a check-off for some reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute."

The Company then filed a petition for a writ of certiorari to review this decision and order of the Court of Appeals. The petition, which was docketed at No. 392

^{*}In the opinion for the majority, Circuit Judge Wright noted that it was 85 miles from Danville to Roanoke where the Union had an office and "thus without a check-off, or some adequate substitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation"; and that the Company "had no general policy against a dues check-off" and its "refusal to check off union dues at the Danville plant was not based on inconvenience." (A. 61-62).

October Term, 1966, was denied by this Court on October 10, 1966 (A. 2).

The Company and the Union, in the ensuing contract negotiations, advocated divergent interpretations of the Board's original order as enforced by the Court of Appeals (A. 83-84). The Union contended that the order required the Company to grant a contract clause providing for the check-off of union dues (A. 88). The Company contended that while the order required it to bargain in good faith over dues collection, the order did not compel the Company to agree to a dues check-off provision (A. 89). Thereafter, the Company and the Union reached and executed a collective bargaining agreement dated December 1, 1966 which contained a provision reserving to the Union the right to request further bargaining on dues check-off, but no actual dues check-off provision was included in this collective bargaining agreement* (A. 85).

On February 28, 1967, the Union filed a motion for clarification of the order of the Court of Appeals dated May 19, 1966 (A. 2). In its motion, the Union requested the Court of Appeals to advise the parties that its order required the Company to agree to the Union's demand for a contract provision for the check-off of union dues (A. 87). On March 22, 1967, the Union's motion was denied by the Court of Appeals on the grounds "that there is in the record no concession from the company that the facts are as alleged by the union,

^{*}Although not part of the record in this case, it may be noted that the parties also entered into two subsequent collective bargaining agreements dated April 1, 1968 and May 1, 1969, the latter being for a term of three years.

and that under the circumstances a contempt proceeding, rather than proceedings in connection with a motion to clarify the decree, would be more appropriate to test the company's compliance with the decree." (Record, Court of Appeals Order dated March 22, 1967).

On April 3, 1967, the Union wrote to John A. Penello, Regional Director of Region 5, National Labor Relations Board, asking that a contempt action be initiated against the Company because the Company had not agreed to a dues check-off provision as the Union contended was required by the Board's original order (A. 109).

On June 22, 1967, Regional Director Penello wrote to counsel for the parties as follows:

"The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisions of the Order, the case is hereby closed" (A. 111).

After the Board thus had found the Company to have bargained in good faith in compliance with its original order and had closed the case, the Union, on July 21, 1967, filed a motion asking the Court of Appeals to reconsider its denial of the Union's earlier motion for clarification (A. 101). The Company, of course, opposed this motion, as it had the Union's earlier motion (A. 112). On December 8, 1967, the Court of Appeals (still, without any evidence on the record or admissions by the Company to support the allegations in the Union's motions and without affording the parties the oportunity to brief or argue the substantive

legal issues involved) granted the Union's motion for clarification; simultaneously issued in Chambers (with Senior Circuit Judge Miller dissenting) a further opinion "with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining"; and remanded the case to the Board "for reconsideration in the light of this opinion" (A. 121).

On July 3, 1968, the Board, without further investigation or hearing, issued its supplemental decision and order affirmatively requiring the Company to "Grant to the Union a contract clause providing for the checkoff of union dues" (A. 137).

The Company filed a petition to review and set aside the supplemental order of the Board, and the Board cross-petitioned for enforcement of its supplemental order (A. 4). The Union intervened in those proceedings (A. 4). The Board's supplemental order was enforced by the Court of Appeals by an order entered on April 22, 1969 (A. 140).

The Company's petition for a writ of certiorari was filed on June 13, 1969 and was granted by this Court on October 13, 1969 (A. 142).

ARGUMENT

The present case brings to this Court the unique situation in which one party has been expressly ordered to agree to a contract provision demanded by the other party during collective bargaining negotiations. Specifically, the National Labor Relations Board has ordered the Company to:

"Grant to the Union a contract clause providing for the checkoff of union dues." (A. 137).

The issue in this case is not whether the Respondent Union should or should not be granted a provision for dues check-off at the Company's Danville plant, but whether the Board, under the guise of remedying a finding of bad-faith bargaining in violation of Section 8(a) (5) of the National Labor Relations Act, can so involve itself in the collective bargaining process as to compel one party to grant a contract clause which the other party was not able to obtain at the bargaining table.

While the Court of Appeals, as stated in its clarifying opinion in this case, believes that "the requirement that a checkoff be granted is at most a minor intrusion on freedom of contract" (A. 128), if the Board can order the Company to agree to this contract clause, there is nothing to prevent it from ordering either an employer or a union to agree to contract provisions concerning wage rates, fringe benefits and other terms and conditions. To permit such a remedy for bad-faith bargaining would be to destroy the very foundation of the collective bargaining process, namely, freedom of contract.

The Company contends that the Board does not have the power under the National Labor Relations Act to order either party to agree to a substantive provision of a collective bargaining agreement. The Congress, while creating a governmental power to assure the right of collective bargaining, precisely proscribed in Section 8(d) of the Act a specific limitation on that power so as also to assure freedom of contract.

Section 8(d) of the National Labor Relations Act provides:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession" (Emphasis added) 29 U.S.C. § 158(d).

The Board is empowered by Section 10(c) of the Act to formulate orders to remedy the commission of unfair labor practices, but Section 10(c) expressly provides that the Board's remedial orders must be such "as will effectuate the policies of this Act." 29 U.S.C. §160(c). The policy of freedom of contract is clearly and expressly set forth in Section 8(d) of the Act and thus, by the terms of Section 10(c), constitutes a direct limitation on the Board's remedial powers. The Board's

Argument.

supplemental order in this case, in ordering the Company to "grant to the Union a contract clause providing for the checkoff of union dues", is in clear derogation and violation of this policy of freedom of contract and, therefore, beyond the Board's remedial powers.

This Court has consistently recognized this fundamental policy of freedom of contract by stating on several occasions that the National Labor Relations Act cannot be utilized, even by indirection, to compel a party to agree to a substantive provision of a collective bargaining agreement.

Even prior to the enactment of Section 8(d), this Court stated in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937):

"The Act does not compel agreement between employers and employees. It does not compel any agreement whatever . . . The Theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." (Emphasis added).

Similarly, this Court, subsequent to the enactment of Section 8(d), said in *NLRB v. American National Ins.* Co., 343 U.S. 395, 404 (1952):

"And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (Emphasis added).

The present supplemental order of the Board represents the precise evil which the Congress intended to

obviate when it enacted Section 8(d). As Mr. Justice Brennan, reviewing the legislative history of Section 8(d), said in NLRB v Insurance Agent's International Union, 361 U.S. 477, 486-487 (1960):

"Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. And in fact criticism of the Board's application of the 'good-faith' test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice. Thus, in 1947 in Congress the fear was expressed that the Board had 'gone very far, in the quise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make.' H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 19. Since the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the goodfaith test of bargaining in to §8(d) of the Act. . . .

"The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended... But it remains clear that §8(d) was an attempt by Congress to prevent the Board from controlling

the settling of the terms of collective bargaining agreements." (Emphasis added).

Until the issuance of its present supplemental order, the Board itself recognized that it did not have authority under the National Labor Relations Act to order the Company to agree to a dues check-off provision. For example, at page 7 of its brief to this Court in opposition to the Company's first petition for certiorari (No. 392 October Term, 1966), the Board stated:

"... [Its original] order in this case did not violate the provision of Section 8(d) of the Act that the statutory duty to bargain collectively 'does not compel either party to agree to a proposal or require the making of a concession * * '.' The Board's order merely directs the Company to bargain with the Union. The Board rejected the Union's request to include a provision 'requiring the company to withdraw its objection to the dues checkoff,' ... and the court of appeals upheld that ruling..."

This is not the only case in which the Board has acknowledged that it does not have statutory authority to compel a party to agree to a substantive provision of a collective bargaining agreement. In NLRB v. Triangle Plastics, Inc., 166 NLRB No. 86 (1967), enforced, 406 F.2d 1100 (6th Cir. 1969), the trial examiner and the Board denied the union's request for an order requiring the employer to pay monetary benefits which the employees would have received if the employer had bargained in good faith. Although the Board chose not to "pass" on his rationale, the trial examiner stated (1967).

CCH NLRB at p. 28,288) that if the relief requested by the union were granted,

"...[T]he Board, in effect, would be fixing terms and conditions of employment retroactively which, I believe, is beyond its statutory authority. The Supreme Court has cautioned the Board that it 'may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." [citing NLRB v. American National Ins. Co., 343 U.S. 395, 404].

Similarly, in United Aircraft Corp., 168 NLRB No. 66 (1967), enforcement denied on other grounds, sub. nom. Machinists v. NLRB, F.2d, 60 CCH LC ¶10,118 (D.C. Cir. 1969), involving a Section 8(a) (5) violation, the Board concurred in the trial examiner's rejection of a request by the General Counsel and the union for an order compelling the employer to agree to dues check-off and other contractual provisions. In Intercity Petroleum Marketers, Inc., 173 NLRB No. 222 (1968), the Board rejected the portion of the trial examiner's recommended order for a violation of Section 8(a) (5) which would have required the employer to sign an agreement containing a union security clause "... since this would require the Board to write a union security clause on which the parties never agreed" (1968-2 CCH NLRB at p. 25,711).

The courts of appeals for several circuits have also recognized that the basic policy of freedom of contract, as expressed in Section 8(d) of the Act, prohibits the Board from directly or indirectly compelling a party to agree to a substantive provision of a collective bargain-

Argument.

ing agreement. Cooper Thermometer Co. v. NLRB, 376 F.2d 684, 690 (2d cir. 1967); NLRB v. American Aggregate Co., 335 F.2d 253, 254-255 (5th Cir. 1964); NLRB v. Lewin-Mathes Co., 285 F.2d 329, 332-333 (7th Cir. 1960); NLRB v. United Clay Mines Corp., 219 F.2d 120, 124-126 (6th Cir. 1955).

In fact, the Board's supplemental order in the present case is even in conflict with a prior decision of the same Court of Appeals which enforced the Board's supplemental order. In Retail Clerks International Association v. NLRB, 373 F.2d 655 (D.C. Cir. 1967), a Section 8(a) (5) case, the Court of Appeals for the District of Columbia Circuit refused to enforce a portion of the Board's order which compelled an employer to execute a contract for certain of the employer's stores because, the Court concluded, there was inadequate support in the record for a finding that the employer and the union had reached an agreement with regard to those stores. In reaching this decision the Court specifically relied on Section 8(d) of the Act. Senior Circuit Judge Edgerton, speaking for the Court, stated on this point (373 F.2d at 660):

"On the record before us we think the Board's order with regard to the twenty-five locations is at odds with §8 (d) of the Act... As the Supreme Court has said: '[Section 8(d)] contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession. * * * And it is equally clear that the Board may not, either directly or indirectly, compel concession or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.' [Citing NLRB]

v. American National Ins. Co., 343 U.S. 395, 404.] Though the Board may properly order execution of a contract to which the parties have agreed, it may not order execution of a contract to which it thinks they should have agreed." (Emphasis added).

While this Court, many circuit courts, and the Board have recognized that Section 8(d) of the Act precludes the Board from ordering a party to agree to a substantive provision of a labor contract, the Court of Appeals in its clarifying opinion in this case stated its interpretation to be that Section 8(d) merely "... relates to the determination of whether a Section 8(a) (5) violation has occurred and not to the scope of the remedy "* (A. 122). Petitioner respectfully submits that this is, at most, a literal interpretation of Section 8(d) and ignores the obvious policy of the Act as the Congress intended it. As pointed out previously. this Court, in NLRB v. Insurance Agents' International Union, 361 U.S. 477, 486-87 (1960), clearly recognized that the intent of the Congress in enacting Section 8(d) was to prevent the Board from "setting itself up as the judge of what concessions an employer must make."

^{*}Actually, the Court of Appeals in its first opinion in this case (in which it enforced the Board's original order, requiring the Company to bargain in good faith, and rejected the Union's request for an order compelling the Company to agree to a dues check-off provision) recognized that Section 8(d) of the Act precludes the Board from ordering a party to agree to a substantive provision of a collective bargaining agreement. The Court of Appeals stated in this regard (A. 65):

[&]quot;It is true, as the company contends, that under Section 8(d) it cannot be compelled to agree to a proposal or make a concession."

and from "controlling the settling of the terms of collective bargaining agreements." It is simply illogical to conclude from these clear expressions of Congressional intent that the Board may not predicate a finding of bad-faith bargaining solely on a party's refusal to agree to a particular contract provision, yet may order that party to agree to the very same contract provision once bad-faith bargaining has been found from other evidence. The prchibition of the former would be meaningless if the Board were permitted to do the latter, since the very reason for this express prohibition in Section 8(d) was to prevent the Board from "controlling the settling of the terms of collective bargaining agreements." NLRB v. Insurance Agents' International Union, 361 U.S. 477, 486-487 (1960).

The Court of Appeals, in attempting to rationalize the view expressed in its clarifying opinion in this case that Section 8(d) does not prohibit the Board from ordering a party to agree to a contract provision, recognized the fundamental Congressional intent and policy that the Board is not to interfere in any manner with the settling of the terms of collective bargaining agreements. The Court of Appeals stated in this regard (A. 124):

"We recognize that the National Labor Relations Act is grounded on the premise of freedom of contract — albeit collective contract. The substantive terms of the collective agreement are to be forged by the parties to it, not by the Board."*

^{*}As authority, the Court of Appeals cited NLRB v. American National Ins. Co., 343 U.S. 395 (1952) and NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960).

Nevertheless, while noting that Board orders which impinge on the principle of freedom of contract "are not to be casually undertaken," the Court of Appeals concluded that such orders must be made available to the Board where necessary to assure the workers' right to bargain collectively (A. 124). Thus, the Court stated (A. 126-127):

"Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will best effectuate the one at least cost to the other. Though ordering an employer to grant a checkoff obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively."

Certainly, a fundamental principle of the Act is to assure the workers' rights to bargain collectively. It is also true, as this Court has recognized.* that in determining whether a party has in fact bargained in good faith there can be "tension" between the principle that a party must bargain in good faith and the principle that the party is not required to agree. However, any such "tension" is necessarily removed by a finding that the party has bargained in bad faith. Thereafter, in fashioning a remedy there need not, and should not, be any tension (much less, conflict) between these two fundamental principles of the Act. A bargaining order, properly enforced through contempt proceedings, if necessary, will assure the workers' rights to bargain collectively, and will do so without conflicting with the principle of freedom of contract.

^{*}NLRB v. Insurance Agents' International Union, 361 U.S. 477, 486-487 (1960).

The failure of the Court of Appeals to recognize the consistency between these two principles is due largely to the Court's apparent concern that unless the Union obtained a dues check-off provision it would not be able to survive at the Danville plant* and the employees would lose their means of collective bargaining, which the Court apparently equated with their "right" of collective bargaining. Thus, supposedly to assure the employees' right to bargain collectively, the Court concluded that the Company could be ordered to agree to a dues check-off provision. However laudable this motive, it assumes that the loss of this particular Union would be equivalent to the loss of the workers' right to bargain collectively. This simply is not true. The Act does not purport to make the workers' right to bargain collectively dependent upon the existence of any particular union.**

^{*}In this regard, the Court noted that a dues checkoff provision "which is included in 92 per cent of all
manufacturing industries labor contracts—is likely to
be of life or death import to the fledgling union, while
it is of no consequence whatever to the employer.
Yet if the Board can do no more than repeatedly order
the company to bargain in good faith, the workers'
rights to bargain collectively may be nullified." (A. 129)

^{**}With regard to the original Act, Senator Wagner stated during the Senate debates on his bill: "It does not favor any particular union." 79 Congressional Record at 2371. In May Stores Co. v. NLRB, 326 U.S. 376, 398 (1945), Mr. Justice Rutledge stated: "Nothing in the Act requires an employer to maintain a union's prestige. . " Former Solicitor General Archibald Cox has commented that the Taft-Hartley Amendments to the Act ". . are rooted in the view that union and employees are not one." Cox, "The Labor Management Relations Act," 61 Harv. L. Rev. 1, 47 (1947).

In its clarifying opinion, the Court of Appeals concluded that an order compelling agreement "may be the only effective remedy" where an employer "has twice been found to have violated his duty to bargain in good faith" (A. 129-130). It is highly questionable whether an order to agree to a specific contract provision could ever effectively remedy a violation predicated (as found in this case) on an overall purpose "to forestall reaching an agreement with the Union." (A. 50)* More significant from a legal standpoint, however, is the fact that the order requiring the Company to "grant to the Union a contract clause providing for the checkoff of union dues" is a punitive order. While the Board is given the power under Section 10(c) of the Act to frame such remedial orders "as will effectuate the policies of this Act." this Court has held that the Act does not authorize the Board to take punitive measures against employers. Local 60, Carpenters v NLRB, 365 U.S. 651 (1961); Phelps Dodge Corp. v NLRB, 313 U.S. 177 (1941); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).

^{*}On this point, the Board's Regional Director concluded that the Board's original order which required the Company to bargain in good faith did effectively remedy the overall bad-faith bargaining which had been found to exist. In the contract negotiations which followed the entry of the original bargaining order and its enforcement by the Court of Appeals, the Company expressed its willingness to the Union to bargain over a dues collection provision. However, the Union insisted that the Board's order, as enforced, required the Company to grant a check-off provision without any further bargaining. Subsequently, the Board's Regional Director concluded that the Company had "satisfactorily complied" with the Board's original order and he thereupon "closed" the case.

In Local 60, Carpenters v. NLRB, 365 U.S. 651, 655 (1961), this Court, in an opinion by Mr. Justice Doug-

las, stated:

"But the power of the Board 'to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation when those consequences are of a kind to thwart the purposes of the Act.' Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 236." (Emphasis added).

In the same case, Mr. Justice Harlan, in a concurring opinion in which Mr. Justice Stewart joined, stated

(p. 657):

"The Board has been told that it is without power to 'effectuate the policies of this Act' by assessing punishments upon those who commit unfair labor practices... The primary purpose of the provision for other affirmative relief has been held to be to enable the Board to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." (Emphasis added).

Similarly, many courts of appeals have held that affirmative orders which command employer action in excess of that required to restore the circumstances which would have existed if no unfair labor practice had been committed, are punitive and unenforceable. Kroger Co. v. NLRB, 401 F.2d 682 (6th Cir. 1968); Local 57, Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir.), cert. denied, 387 U.S. 942 (1967); J. P. Stevens & Co. v. NLRB, 380 F.2d 292 (2d Cir.), cert. denied, 389 U.S. 1005 (1967).

The Board's order requiring the Company to "grant to the Union" a dues check-off provision is punitive, rather than remedial, and thus contrary to the Act, in that the order does not serve to restore the status quo since it gives to the Union the benefit of a contract provision which never previously existed between the parties.

Apparently, the Court of Appeals does not believe that a party can meet its obligation to bargain in good faith by merely bargaining in good faith. For example, after noting that the Board's Regional Director had concluded that the Company had bargained in good faith subsequent to the Board's original bargaining order and had, therefore, "closed" the case, the Court of Appeals in its clarifying opinion stated:

"...[T]he Board had apparently accepted the company's interpretation of the decree as requiring only that it now bargain with the union as to some form of dues collection..." (A. 119-120).

"We did not think that under the Board order the company could now purge itself of its bad faith and meet its Section 8(d) obligations by agreeing simply to negotiate on alternatives to a checkoff. Apparently we misread the Board's order, for the Board is apparently satisfied that the employer has complied with its duty to bargain in good faith by agreeing to such negotiations." (A. 120). (Emphasis added).

Thus, the Court of Appeals apparently believes that the Company must do more than just bargain in good faith in order to satisfy its bargaining obligation. Instead, the Court of Appeals apparently has mistakenly equated the Company's obligation to bargain with an obligation to agree to the Union's demand for a dues check-off provision.* The fallacy of this type of reasoning was noted by Mr. Chief Justice Burger in his dissenting opinion in *United Steelworkers of America v. NLRB*, 390 F.2d 846, 855 (D.C. Cir. 1967), cert. denied, 391 U.S. 904 (1968):

"It may be tempting to suggest that a corollary of the duty to bargain to reach an overall agreement is a duty to bargain with the object of reaching an agreement on each item proposed. But this has never been held to be the law by any court and it is inconsistent with the §8(d) provision that neither party need yield on a point."

The Court of Appeals also attempts to justify the order requiring the Company to agree to a dues check-off provision on the grounds that since it was found that the Company "had no business reason for refusing the check-off," the Company cannot thereafter maintain any legally justifiable reason for any further de-

^{*}This is not surprising in view of the almost total preoccupation of the Trial Examiner and the Court of Appeals with the subject of check-off in determining that the Company had bargained in bad faith, rather than the "entire conduct of the respondent, particularly its conduct at the bargaining table" on which the Board and the Courts should rely in deciding whether or not a party has bargained in good faith. See Separate Opinion of Mr. Justice Frankfurter in NLRB v. Insurance Agents' International Union, 361 U.S. 477, 508 (1960).

nial of a dues check-off provision.* If the Board's supplemental order in this case is allowed to stand, the "new bargaining device" envisioned by Mr. Chief Justice Burger in his dissenting opinion in *United Steelworkers of America v. NLRB*, 390 F.2d 846 (D.C. Cir. 1967), cert. denied, 391 U.S. 904 (1968), will have come to pass:

"The parties may now reach an over-all contract incorporating those provisions they agree on and excluding those they do not, after the usual 'horse' trading processes of bargaining, then one party can come to the Board and claim that the refusal to agree to some prevision which was not included was an unfair labor practice because the recalcitrant party lacked a sufficient business or union reason." 390 F.2d 846, 858.

^{*}As to whether a "business" reason has to be given for refusing a bargaining demand, Mr. Chief Justice Burger commented in his dissenting opinion in *United Steelworkers of America v. NLRB*, 390 F.2d 846, 855-856 (D.C. Cir. 1967), cert. denied, 391 U.S. 904 (1968):

[&]quot;No authority is cited for the proposition that failure to give 'business' reasons for rejection of a demand is itself an unfair labor practice. Would there not be 'legitimate reason of self-interest' in withholding approval of dues check-off until some year's bargaining when the Company had little else to offer?

[&]quot;Although apparently no case has held explicitly that a bargainer may legally refuse a demand without giving some 'business' reason, there is authority implying that he may lawfully do so." [Citing NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958)].

This immersion of the Board into the collective bargaining process becomes complete when the Board, as it did in the present case, weighs the reasonableness of the parties' positions, gauges the extent to which an order to agree would intrude on freedom of contract and orders the recalcitrant party to agree to the particular contract provision. This, of course, is exactly what the Congress has prohibited the Board from doing by the provision in Section 8(d) of the Act that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession. . . ."

CONCLUSION

The Board, being an agency created by our national labor laws, cannot exceed the legislative intent of its creation as it attempts to do, with the sanction of the Court of Appeals, in this case. Rather than giving full expression to the Congressional purposes and policies contained in Section 8(d) of the National Labor Relations Act, the Board and the Court of Appeals seek to circumvent and avoid those clear and succinct purposes and policies by directly and patently compelling the Company to agree to a substantive provision of a collective bargaining agreement.

While the Court of Appeals places heavy emphasis on the need to assure the workers' rights to bargain collectively, there can be no greater danger to those rights than an order which requires a party to agree to a substantive provision of a collective bargaining agreement. For, if the Court of Appeals' decision is allowed to stand as part of our federal labor law, such law will be just as applicable to unions as to employers.

Thus, while the Board's present order is in direct conflict with the fundamental policy of freedom of contract as expressed in Section 8(d) of the Act, it also lays the foundation for the erosion of the workers' rights to bargain collectively. There could be no true or free collective bargaining if the Board had the power to order either bargaining party to agree to a contract demand made by the other party. Wisely and expressly the Congress has withheld from the Board the power to issue the order which is now before this Court for review.

For the foregoing reasons, Petitioner respectfully requests that the order of the United States Court of Appeals for the District of Columbia Circuit be reversed.

Respectfully submitted,

DONALD C. WINSON
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner

PAUL R. OBERT
THOMAS P. LUSCHER
1500 Porter Building
Pittsburgh, Pennsylvania 15219

WM. ALVAH STEWART
ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Of Counsel

November 1969

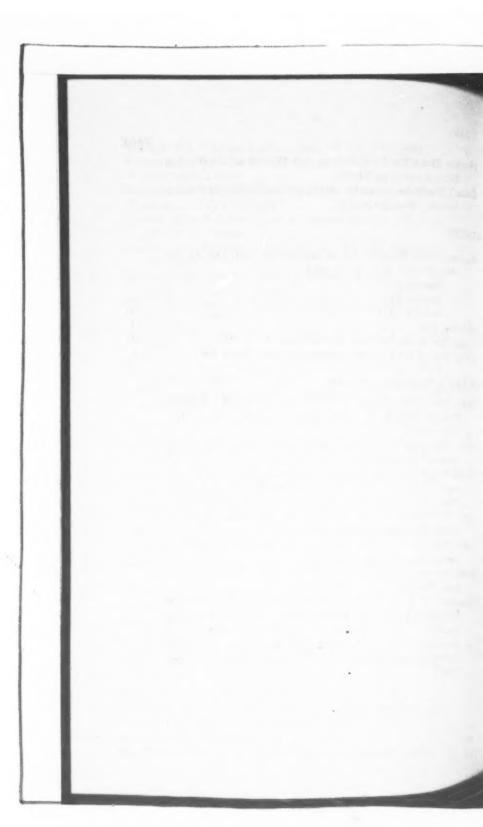


2343

INDEX	
Bestin SC 4 of Discher School Street, and School Sc	PAGE
TEREST OF THE AMICUS CURIAE	1
THE OF A DOLLMENT	2
ARGUMENT did not intend that the Board should be empowered	4
under guise to determine the substantive terms of collective bargaining agreements	4
effective nor the most desirable alternative available to leffledy the	7
III. The remedy devised by the Court below is contrary to the National Labor policy and would seriously erode the statutory scheme of the act	10
W. The remedy devised is not limited to the Particular factual	MAR.
justify even further intrusions into the process of voluntary collective bargaining	12
AUTHORITIES CITED	
CATES:	
Boire v. Greyhound Corp. 376 U.S. 473 (1964)	13
U.S. 197 (1938)	
(1963)	11
H. W. Elson Bottling Co., 155 NLRB 714, mod. & enf. 379 F. 2d 223 (6th Cir., 1967)	
Ex-Cello-O Corporation, Case 25-CA-2377 (pending decision before the National Labor Relations Board) Jones & Laughlin Steel Corp. v. National Labor Relations Board	
301 II S 1 (1937)	. 3
Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) National Labor Relations Board v. American Aggregate Co., 355	. 10
F.2d 253 (5th Cir., 1964) National Labor Relations Board v. American National Insurance	. 0
Co., 343 U.S. 395 (1952)	. 3
IIS 426 (1941)	. 4
National Labor Relations Board v. Fansteel Metallurgical Corp. 306 U.S. 240 (1939)	•

	PAGE
National Labor Relations Board v. Gissel, 395 U.S. 575 (1969) National Labor Relations Board v. Herman Sausage Co., 275 F.2d	6
229 (5th Cir., 1960)	7
National Labor Relations Board v. Insurance Agents International Union 361 U.S. 477 (1960)	2
National Labor Relations Board v. Lewin-Mathes Co., 285 F.2d 329 (7th Cir., 1960)	06.00
National Labor Relations Board v. Merrill, 414 F.2d 1323 (10th	6
Cir., 1969)	10
LRRM 2163 (5th Cir., 1966) National Labor Relations Board v. Nash-Finch Co., 211 F.2d 622	10
(8th Cir., 1954)	6
1954)	10
NLRB v. F. M. Reeves & Sons, 47 LRRM 2480 (10th Cir., 1961), cert. denied, 366 U.S. 914 (1961)	10
National Labor Relations Board v. F.M. Reeves & Sons, 47 LRRM	
2480 (10th Cir., 1961)	10
78 (2nd Cir., 1965)	10
344 (1953)	4
229 F.2d 652 (9th Cir., 1956)	10
National Labor Relations Board v. Star Metal Manufacturing Co., 187 F. 2d 856 (3rd Cir., 1951)	10
National Labor Relations Board v. United Clay Mines Corp., 219 F.2d 120 (6th Cir., 1955)	6
National Labor Relations Board v. Vander Wal, 316 F.2d 631 (9th	
Cir., 1963) National Labor Relations Board v. Warren, 350 U.S. 107 (1955)	9 2
Penfield v. SEC, 330 U.S. 567 (1947)	9
before the NLRB)	2
Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940)	4
Retail Clerks International Assoc. v. NLRB, 373 F.2d 655 (D.C. Cir., 1967)	6
Skyline Homes v. NLRB, 65 LRRM 3125 (5th Cir., 1967) J.P. Stevens & Co., 157 NLRB 869, mod. & enf. 380 F.2d 292	9
(2nd Cir., 1967), cert. den. 389 U.S. 1005	9
Terminal Assoc. v. Trainmen, 318 U.S. 1 (1943)	10
West Texas Utilities Co. v. NLRB, 206 F.2d 442 (D.C. Cir., 1953).	10

	PAGE
Herman Wilson Lumber Company, Case No. 26-CA-2536 (Pending decision before the NLRB)	2
Zinke's Foods, Inc., Cases No. 30-CA-372 and 30-RD-400 (Pending decision before the NLRB)	2
TATUTES	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et. seq.)	
Section 8(a)(5)	4
Section 8(d)	4
Section 10(c)	4
70 Cong Rec	4
Hist, of the National Labor Relations Act of 1935	5
Leg. Hist. of the Labor-Management Relations Act of 1947	5
RTICLES AND MISCELLANEOUS	
Note, Employer's Refusal to Bargain and the NLRB's Remedial Powers: The H. K. Porter Case, 35 Univ. Chi L. Rev.	
777 (1968)	1
Note, The Need For Creative Orders United Section 19(5) of the National Labor Relations Act, 112 Univ. Pa. L. Rev. 69 (1963) NLRB General Counsel Ordman, Mandatory Subjects of Bargaining, Institute of Collective Bargaining and Group Relations	8
(May, 1969), reprinted at 71 Lab. Rel. Rep. 64 (BNA 1969). 1965 Proceedings of the American Bar Association Section of	7
Labor Relations Law (ABA 1965)	12
Labor Relations Law (ABA 1966)	13
Lab. Rel. Yearbook 299 (BNA 1963)	8
Publishers Association, Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, Senate, 90th Cong., 2nd Sess., Cong. Oversight of	
Administrative Agencies (NLRB) pp. 656 (Committee Print,	
1968)	11



In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, Inc.

DISSTON DIVISION - DANVILLE WORKS,

Petitioner.

v.

NATIONAL LABOR RELATIONS BOARD,

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

The issue involved in the instant case—the dictation by the National Labor Relations Board of the terms and conditions of collective bargaining agreements—is a matter of substantial national concern. Approval of such a practice would sharply erode, if not destroy altogether, the principle of voluntary collective bargaining which is the cornerstone of our national labor policy. It is no doubt because of this paramount consideration that in no previous instance in the thirty-four year history of the Act has the Board granted the remedy here sought. And surely, if the Board can penalize the H. K. Porter Company

^{*}This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

by requiring, in order to remedy the particular misconduct here at issue, that Company must agree to a dues checkoff clause, the Board may also penalize other employers and unions for other violations of law by requiring that they agree to other substantive contractual provisions.

The interest of the Chamber therefore, in filing this Brief Amicus Curiae in support of the position of Petitioner urging reversal of the decision below, is predicated upon the potentially substantial and far-reaching consequences that the result in that case may have for American industry. Affirmance of the Court of Appeals viewpoint would contravene clear Congressional intent by interposing the Board as an arbiter of "the parties' substantive solutions of the issues in their bargaining." It would also disregard the numerous alternative weapons available in the Board's remedial arsenal as well as the contempt powers of appellate courts, the "ultimate sanction to secure compliance with Board orders", and establish instead an enclave of administrative law where such contempt powers are subordinated to a secondary and inconsequential role. And finally, it would negate the basic tener of the Act that it is voluntarism rather than compulsion or government fiat which is at the heart of the American collective bargaining system. A matter of this magnitude, the Chamber believes, warrants the presentation of its views before this Court.

SUMMARY OF ARGUMENT

The situation which confronted the Board and Court here-a "recalcitrant employer" whose "sole purpose in refusing a checkoff was to frustrate

¹The Chamber has previously filed briefs amicus curiae in Zinke's Foods, Inc., Case No. 30-CA-372 and 30-RD-400; Ex-Cello-O Corporation, Case No. 25-CA-2377; Herman Wilson Lumber Company, Case No. 26-CA-2536; and Rasco Olympia, Inc., Case No. 19-CA-3187, all presently pending decisions before the Board. These cases, which involve the issue of "whether the Board has authority to order an employer to reimburse his employees for the loss of wages and fringe benefits that they would have obtained through collective bargaining if the employer had not refused to bargain in good faith," raise many of the same considerations as the instant case. See Section IV of the Argument Section of this Brief.

²NLRB v. Insurance Agents' International Union, 361 U.S. 477, 486-7 (1960).

³NLRB v. Warren Company, Inc., 350 U.S. 107, 113, (1965).

⁴It is assumed, arguendo, for purposes of this Brief, that the H. K. Porter Company has been properly classified as a "recalcitrant employer." This assumption, however, is clearly open to serious question in light of the Company's overall conduct. The Company bargained frequently with the Union; it reached agreement on all items involved except for the proposed checkoff clause; it signed a contract which the Union also executed; and it subsequently offered to bargain with the Union with respect to alternative methods of dues collection. The Board concluded that in these circumstances there was no basis for initiating a contempt action against the Company since it had "satisfactorily complied" with all provisions of the Court's Order (App. to Pet. for Cert., p. 18). It is difficult to understand how, therefore, the Company can be repeatedly viewed by the Court below and the Board as a habitual offender of the most reprehensible type. Cf. Note, Employer's Refuel to Bargain and the NLRB's Remedial Powers: The H. K. Porter Case, 35 Univ. Chi L. Rev. 777, 784-6 (1968).

alize

they

e in

w, is

Ourt

nter-

pons

rs of

loard

such

And

ather

rican

eves,

trant

trate

s No.

Vilson.

3187.

ue of or the

same Brief

y has

early sined

the .

nd it dues ating

h all

tand

loard

al to

777.

agreement with a union" bis one which obviously warrants the invocation of a strong and effective remedy. But the exigencies of the problem provide no excuse for abandoning the guiding principles and purposes of the Act. Moreover, other feasible alternatives are available which both remedy the matter at hand while accommodating these basic policies. The decisions below recognized that the present case involves a conflict between the concept of the employer's duty to bargain with the representative of his employees and the competing concept of his freedom of contract; they rationalize the remedy devised as one "which will best effectuate the one [concept] at least cost to the other." (App. to Pet. for Cert., pp. 25, 34). We take issue with this critical conclusion for the following reasons:

First, that the remedy here devised is diametrically contrary to the mandate of Congress that, in order to preserve the concept of freedom of contract, the Board should have no power whatsoever to "sit in judgment upon the substantive terms of collective bargaining agreements.";6

Second, that the remedy here devised is not the only alternative, nor even necessarily the most effective or desirable alternative, that the Board and courts may utilize to rectify the problem of an employer who repeatedly refuses to bargain in good faith; and

Third, that the remedy here devised proceeds from an erroneous view of collective bargaining; it fails to recognize that the determination of the terms and conditions of employment, under a system where the government does not control the results of bargaining, is predicated on the mutual understanding and free assent of labor and management; and

Fourth, that the remedy here devised is not necessarily limited to the particular factual situation involved in the instant case but, conversely, represents a dangerous intrusion into the process of voluntary collective bargaining which will no doubt be utilized by the Board to justify even further and more serious intrusions as, for example, in cases such as those cited at footnote 1, supra.

⁵The finding of the Board and the Court below in this respect, predicated on the premise that the grant of a check off "is of no consequence whatever to the employer" (App. to Pet., p. 28), seriously misconstrues the realities of bargaining. First, some employers may legitimately resist a checkoff on the basis that it "strengthens the union and increases its ability to press home its demands in later negotiations". Note, Employer's Refusal to Burgain and the NLRB's Remedial Powers: The H. K. Porter Case, supra n. 4, p. 784. In other cases, employers may reasonably refuse a checkoff as the result of the contrary belief that the absence of such a provision actually makes for a more effective collective bargaining relationship by compelling the union to be responsive to the grievances of its constituency and by providing it with a forum through the necessity of dues-collection to obtain knowledge of such grievances. In either case, even though the Court and the Board may not categorize such considerations as "business reasons" for resisting a checkoff demand, the employers' motives are nevertheless of substantial importance to their operations and entirely consistant with the policies of the Act.

⁶NLRB v. American National Insurance Co., 343 U.S. 395, 404 (1952).

ARGUMENT

I.

CONGRESS DID NOT INTEND THAT THE BOARD SHOULD BE EMPOWERED UNDER ANY GUISE TO DETERMINE THE SUBSTANTIVE TERMS OF COLLECTIVE BARGAINING AGREEMENTS

The crux of the decision below is the supposition that the Congressional intent manifested in Section 8(d) of the Act⁷ relates only

"to 'whether a Section 8(a)(5) violation has occurred and not to the scope of the remedy which may be necessary to cure violations which have already occurred.' Once the failure to bargain in good faith has been determined, the formulation of an order to remedy the effects of the unfair labor practice is governed by the policies which underlie Section 10(c) of the Act." (Emphasis the Court's; Bd. Opp. to Pet. for Cert., p. 8).

This contention represents a substantial misconception of the Act. In interpreting the remedial limitations of Section 10(c), it is essential to study the intent of Congress in adopting the underlying unfair labor practice which the Board's order seeks to remedy, in this case Section 8(a)(5) as clarified by Section 8(d). Congress thus intended that "the power of this Board to issue orders is strictly limited to the preservation of the industrial freedom granted specifically by the [Act]" and the Board's remedial power necessarily "has the essential limitations which inhere in [not merely the policies which underlie 10(c) but in] the very policies of the Act which the Board invokes." Nor may a Board order be justified on the basis of deterring future violations of the Act, because "if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up a system of penalties which it would deem adequate to that end." Board orders, in short, must be "persuasively... related to the proven conduct" and must be "functions of the purposes to be accomplished."

Congress has made it abundantly clear that one of "the essential limitations which inhere in the very policies of the Act" is that the Board is precluded from regulating the terms and conditions of collective bargaining agreements

⁷Section 8(d), which defines the bargaining obligation, specifically limits that obligation by providing that it "does not compel either party to agree to a proposal or require the making of a concession..."

⁸Speech of Senator Wagner, 79 Cong. Rec. 6184 (1933).

⁹NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257 (1939).

¹⁰ Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940).

¹¹NLRB v. Express Publishing Co., 312 U.S. 426 (1941).

¹²NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953).

regardless of the talisman used to justify such regulation. In 1935, when the Senate Committee inserted the bargaining duty into the Act, it said:

"The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." S. Rep. No. 573, 74th Cong., 1st Sess. 12, 2 Leg. Hist. of the National Labor Relations Act of 1935 at 2312. 13

Statements of the same nature were also voiced in the House. Congressman Connery, Chairman of the House Committee on Labor, stated that the "bill just compels [the employer] to deal with the men collectively"; Congressman Griswold declared that "The bill does not fix hours, wages, or working conditions nor does it allow any Government agency to do so"15; and Congressman Welch expressed the view that "nothing in the bill allows the Federal Government or any agency to fix wages, regulate rates of pay, limit hours of work, or to effect or govern any working condition in any establishment or place of employment." See also the similar statements of this Court in Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

In 1947, Congress, expressing the fear that the Board had "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of the concessions an employer must make and of the proposals and counter proposals he may or may not make" concluded that "unless Congress writes into the law guides for the Board to follow the Board may attempt to carry this process even further and seek to control more and more the terms of collective bargaining agreements". The House Conference Report subsequently described the resultant bill as having achieved this objective: "... the Senate amendment [Section 8(d)], while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as did the House bill in this regard, since it rejected, as a factor in determining good faith, the test of

¹³ Senator Walsh, Chairman of the Committee on Education and Labor, similarly explained the bill which his Committee reported to the Senate:

[&]quot;Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit hours of work, or to effect or govern any working condition in any establishment of place of employment.

[&]quot;... There is nothing in this bill that compels any employer to make any agreement about wages, hours of employment, or working conditions with his employees." 79 Cong. Rec. 7659 (1935); 2 Leg. Hist. of the Labor Relations of 1935 at 2373.

¹⁴² Leg. Hist. of the Labor Relations Act of 1935 at 3118.

¹⁵⁷⁹ Cong. Rec. 9682 (1935).

¹⁶⁷⁹ Cong. Rec. 9711 (1935).

¹⁷1 Leg. Hist. of the Labor-Management Relations Act of 1947 at 310-2.

making a concession and thus prevented the Board from determining the merits of the position of the parties." This Court, 19 as well as others, 10 have subsequently voiced similar views.

In sum, both the legislative history of the Wagner and Taft-Hartley Acts, as well as numerous decisions of this Court, make it plain that Congress did not intend that the Board should have the power it seeks to exercise in the instant case. Indeed, during the thirty-four years prior to the present case, no authority is cited by either the Board or the Court which has even suggested that the Board has such authority. As this Court recently observed in another context: "No amount of drum-beating should be permitted to overcome, without legislation, this history." 21

The Court of Appeals here seeks to overcome this history, and somehow discover in the interstices of the Act a heretofore undisclosed power in the Board to compel unilateral contractual concessions, by invoking as a touchstone the Board's remedial powers under Section 10(c) of the Act. That Section, however, expressly limits the Board to remedies which will "effectuate the policies of the Act" and, in addition, is further restricted by the well-established principle that Board remedies must perform a restorative, rather than a deterrent or penal, function.²² Compelling agreement to certain terms and conditions of employment performs no restorative function; in the present case it "in fact gives the union something which, but for the 8(a)(5) violation, it probably could not have achieved."²³ Thus, "what the Board has done, in the guise of remedying unfair labor practices, is to attempt to bestow upon the respondent's union employees the benefits which it believes the Union should have obtained but failed to obtain for them as a result of its collective bargaining with the respondent on their behalf."²⁴

The remedy fashioned by the Board similarly does not effectuate the policies of the Act. The Board, at least "indirectly", is thereby permitted "to sit in judgment upon the substantive terms of collective bargaining agreements."²⁵ For example, the decision below viewed the requirement that a checkoff be

^{18/}d. at 538.

¹⁹NLRB v. American National Insurance Company, supra; NLRB v. Insurance Agents International Union, supra.

²⁰NLRB v. United Clay Mines Corp., 219 F.2d 120 (6th Cir., 1955); NLRB v. Herman Sausage Co., 275 F.2d 229 (5th Cir., 1960); NLRB v. Lewin-Mathes Co., 285 F.2d 329 (7th Cir., 1960); NLRB v. American Aggregate Co., 335 F.2d 253 (5th Cir., 1964); Retail Clerks International Association v. NLRB, 373 F.2d 655 (D.C. Cir., 1967).

²¹NLRB v. Gissel Packing Co., 395 U.S. at n. 17.

²²Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-6.

²³Note, Employer's Refusal to Bargain and the NLRB's Remedial Powers: The H. K. Porter Case, supra n. 4, p. 787.

²⁴NLRB v. Lewin-Mathes Co., supra, quoting NLRB v. Nash-Finch Co., 211 F26 622, 627 (8th Cir., 1954).

²⁵NLRB v. American National Insurance Company, supra, at 404.

ganted as "at most a minor intrusion on freedom of contract" and held that, as a result, the Company could be required to make a "reasonable" counter-offer or even be compelled to agree to such a clause "in return for a reasonable concession by the union" (App. to Pet. for Cert., pps. 27-9 and fn. 17). Such an approach raises a host of questions which Congress clearly did not intend for Board resolution. Is the grant of a checkoff actually only a "minor" intrusion²⁶ and, if so, what type of forced agreements should then be categorized as a "major" intrusion? How much is a checkoff worth, i.e., what would constitute a "reasonable" counter-offer or a "reasonable" concession? Would a similar remedy have been invoked if the Company had not twice refused to bargain in good faith or had not been a "recalcitrant" employer or if a first negotiation had not been involved? In effect, therefore, by reason of the decision below, the Board must necessarily subject "the parties to direction either by compulsory arbitration or the more subtle means of determining that the position is inherently unreasonable, or unfair, or impracticable, or unsound". 27

11

THE REMEDY DEVISED BY THE COURT BELOW IS NEITHER THE MOST EFFECTIVE NOR THE MOST DESIRABLE ALTERNATIVE AVAILABLE TO REMEDY THE PROBLEM OF THE RECALCITRANT EMPLOYER

The Court of Appeals seeks to legitimatize its intrusion on the parties freedom to contract by the critical assumption "that the Board's remedial measures have not proved adequate in coping with the recalcitrant employer ... " (App. to Pet. for Cert., p. 26). Such a contention contrasts sharply with the recent pronouncement of NLRB General Counsel Ordman that "despite the generality of the legislative formulation and the conspicuous lack of success of efforts by Congress to fashion more precise formulations, the collective bargaining process has coped extraordinarily well with the problems presented . . . the several Congresses acted with uncanny prescience when they declined to shackle the collective bargaining process with rigid prescriptions which could inhibit the innovative and imaginative talents of the participants in the bargaining process".28 It also flies in the face of the Fifth Circuit's declaration in Herman Sausage, the case principally relied upon by the Steelworkers Union in its Brief in Opposition, that once the decision that a party has bargained in bad faith is made, "the sanctions of the Act are undoubtedly potent, swift and adequate." (275 F.2d at 230).

¹⁶See footnote 6, supra.

²⁷NLRB v. Herman Sausage Co., supra at 231.

²⁸NLRB General Counsel Ordman in a speech entitled "Mandatory Subjects of Bargaining" given before the Institute of Collective Bargaining and Group Relations in May, 1969, reprinted at 71 Lab. Rel. Rep. 64, 65 (BNA 1969).

The Ross study, 29 which the Appeals Court relies on to support its assumption of inadequate Board remedies, actually provides little foundation for this assumption. Thus Dr. Ross, while finding that the Act does not contain "adequate and realistic remedies" to cope with the habitual violator of Section 8(a)(5), also found that in most cases where newly certified unions did not succeed in obtaining a first contract "the reasons for the breakdown of bargaining were not related to employer's refusal to bargain or other unfair labor practices;"30 that the law was not "relatively ineffective" in this area;31 that there were "only a bare handful of cases" which involved repeated violations of the bargaining obligation;32 and that in such cases the "employers who elect to persevere in their hostility to collective bargaining run known and ascertainable risks [which] ... include economic action undertaken by a union, the expense and trouble of litigation and the necessity of observing at some point the specific requirements of an order or decree."33 Moreover, and of perhaps paramount importance, in those cases where such sanctions were not "fully effective", the remedial recommendations of Dr. Ross expressly contained the caveat that they were:

"...not to be confused with Board determination of the substantive terms of a contract. They are remedies designed to cope with the actual effects of a violation upon employee rights; wages, hours and other working conditions are left to the parties to work out through negotiations. Their purpose is to impose the bare minimum of collective bargaining upon employers who have deliberately sought to gain from their unlawful conduct" (Emphasis supplied).³⁴

Dr. Ross' proposals to deal with the "clearcut, naked refusal to bargain cases which are accompanied by widespread unfair labor practices or in the context of repeated violations", were accordingly designed to "reinforce the standard general order to bargain" and "restore the parties as much as possible to their positions prior to the violation." Other observers have made similar recommendations, and have similarly rejected the concept of Board intrusion "into substantive terms of bargaining", to solve the problem of the repeated violator of Section 8(a)(5).³⁵

While the Chamber does not necessarily agree with all of the proposals advocated by Dr. Ross and the University of Pennsylvania Note, many of the

²⁹Ross, Analysis of Administrative Process under Taft-Hartley, 1963 Lab. Rel. Yearbook 299 et seq. (BNA 1963).

^{30/}d. at 306.

³¹ Id. at 309.

^{32/}d. at 308.

³³ Id. at 318.

^{34/}d. at 319-20.

³⁵E.g., Note, The Need For Creative Orders Under Section 10(c) of the National Labor Relations Act, 112 Univ. Pa. L. Rev. 69, 84-6 (1963). The Note suggests:

[&]quot;The NLRB can maximize compliance with the Act by formulating orders that direct the party guilty of bad faith temporarily to perform acts that the statute does

suggestions do have manifold advantages over the remedy utilized by the Board and court below. They would complement, rather than conflict with, the statutory framework of freedom of contract. They would permit easier enforcement and thus be a more effective deterrent. They would be consistent with the remedies fashioned by the Board to meet the problem of recalcitrant employers in other areas of the national labor law. They would, in short, in marked contract to permitting Board regulation of contractual terms, "effectuate [one policy of the Act] at least cost to [competing policies]".

The Court of Appeals' assumption that the Board's remedial powers have proved inadequate also significantly ignores the remedial powers available to the courts. As this Court observed in NLRB v. Warren Company, Inc., supra at

112-3:

"The [Court of Appeals] decree, like the [Board] order it enforces, is aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance is not forthcoming, that objective is frustrated. It is for this reason that Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders. The granting of withholding of such remedial action is not wholly discretionary with the court. This is true not only under the National Labor Relations Act but also under general principles of equity jurisprudence." (Emphasis supplied; footnotes omitted).

Contempt has long been recognized as the appropriate vehicle for punishing contemptuous conduct and compelling the contemnor "to do what the law requires of him." It provides a broad and flexible weapon which permits appellate courts to impose "whatever sanctions are necessary under the circumstances to grant full remedial relief, to coerce the contemnor into compliance with [the] court's order, and to fully compensate the complainant for losses sustained". Courts of appeals have, accordingly, employed their contempt powers in numerous varied ways to deal with those employers who have repeatedly failed to honor their bargaining obligation: such companies have been required to post appropriate notices, file sworn statements of the steps taken to comply with the court's directive and pay to the Board all fees and

not require of a person not guilty of bad faith. The Board must not intrude into substantive terms of bargaining, but it might complement the general good faith obligation by ordering the guilty party to assume the burden of commencing negotiations and arranging subsequent meetings, to offer a contract he is willing to sign, to give specific reasons for rejecting the other side's proposals, to make counter-proposals, to send to the bargaining meetings a representative competent to make concessions and reach agreement, or to provide stenographers at the meetings if the nonguilty party does not object..." (Emphasis supplied; footnotes omitted.)

³⁶See, e.g., J.P. Stevens & Co., 157 NLRB 869, mod. & enf. 380 F.2d 292 (2nd Cir., 1967), cert. den. 389 U.S. 1005; H.W. Elson Bottling Co., 155 NLRB 714, mod. & enf. 379 F.2d 223 (6th Cir., 1967).

³⁷Penfield Co. v. SEC, 330 U.S. 567, 593 (1947).

³⁸NLRB v. Vander Wal, 316 F.2d 631 (9th Cir., 1963) and cases cited thereat.

expenditures incurred in connection with the contempt proceeding,³⁹ pay a lump-sum compliance fine for their contempt;⁴⁰ pay a daily compliance fine,⁴¹ pay both a lump-sum compliance fine (of as much as \$30,000) and a daily compliance fine (of as much as \$1000 a day)⁴² be subjected to issuance of a writ of body attachment against their managing officer and to his confinement in custody;⁴³ and be held in criminal contempt.⁴⁴

Such utilization of the traditional and potent contempt power of the appellate courts is consistent with the policies of the Act. Indeed, its use is specifically sanctioned by Congress in Section 10 thereof. Accordingly, when such contempt powers have not been invoked, particularly where such disuse results from the Board's belief that the respondent involved has satisfactorily complied with the court decree (App. to Pet. for Cert., p. 18), the court should not thereafter on its own motion suggest a novel and self-destructive remedy on the ground that effective alternatives are not available.

III.

THE REMEDY DEVISED BY THE COURT BELOW IS CONTRARY TO THE NATIONAL LABOR POLICY AND WOULD SERIOUSLY ERODE THE STATUTORY SCHEME OF THE ACT

The National Labor Relations Act "does not undertake governmental regulation of wages, hours or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them." This system of resolving disputes and adjusting competitive interests through free and voluntary collective bargaining, with its concommitant rejection of a national labor policy "erected on a foundation of government control of the results of negotiations", has been repeatedly recognized by this Court as "the keystone of the federal scheme to promote industrial peace" and "the essence of the

³⁹NLRB v. Merrill, 414 F.2d 1323 (10th Cir., 1969); Skyline Homes v. NLRB, 65 LRRM 3125 (5th Cir., 1967); NLRB v. Mooney Aircraft, Inc., 61 LRRM 2163 (5th Cir., 1966).

⁴⁰NLRB v. F.M. Reeves & Sons, 47 LRRM 2480 (10th Cir., 1961), cert. denied, 366 U.S. 914 (1961).

⁴¹ NLRB v. Shannon & Simpson Casket Co., 229 F.2d 652 (9th Cir., 1956).

⁴² West Texas Utilities Co. v. NLRB, 206 F.2d 442 (D.C. Cir., 1953); NLRB v. Nesen, 211 F.2d 559 (9th Cir., 1954); NLRB v. Vander Wal, supra.

⁴³NLRB v. Savoy Laundry, Inc., 354 F.2d 78 (2nd Cir., 1965).

⁴⁴ NLRB v. Star Metal Manufacturing Co., 187 F.2d 856 (3rd Cir., 1951).

⁴⁵ Terminal Assn v. Trainmen, 318 U.S. 1,6 (1943).

⁴⁶ NLRB v. Insurance Agents' International Union, supra at 290.

⁴⁷ Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962).

federal scheme". 48 As the American Bar Association Section of Labor Relations Law stated in 1965:

y

a

nt

d

1

"All the provisions of the original NLRA, and most of the provisions of the Taft-Hartley Act, are designed to make possible the negotiation of collective bargaining agreements between the employers and unions. Even so, Congress did not require that the parties must reach an accord, and Section 8(d) was added by the Taft-Hartley Act to make this expressly clear. And Congress retained this policy with full realization that industrial peace was seriously endangered whenever the parties could not come to a mutual understanding. Though Congress found it necessary, in the public interest, to make certain terms and conditions of employment illegal, notwithstanding the mutual understanding of the parties, it carefully refrained otherwise from dictating what any of the terms and conditions should or should not be and declared that the National Labor Relations Board was likewise to leave the resolution of agreements entirely to the mutual understanding of the parties. Thus, the freedom and necessity, if possible, of labor and management negotiating the terms and conditions of employment to govern their relationship is the cornerstone of our national labor policy and must remain so unless and until Congress adopts a different solution to labor-management controversies

"Except for the necessary imposition of minimum wages and hours, such as in the Fair Labor Standards Act, and the prohibition or regulation in the public interest of certain conditions, as in Section 302 of the Taft-Hartley Act, Congress has left the determination of working conditions entirely to the mutual understanding of the employer and the union representing its employees. What those terms shall be is to be resolved solely by mutual negotiation and free assent by the parties. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); Local 357, Int'l Brotherhood of Teamsters v. NLRB, 365 U.S. 667, 676, 81 S.Ct. 835, 840 (1961). And neither management nor labor is to be subject to compulsion by the Labor Board, or any other agency, to influence their decision. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 80 S.Ct. 419 (1960). Moreover, the Supreme Court has made it clear that Congress alone may determine policy and therefore the NLRB must apply the law as prescribed by Congress and may not impose its own notions of what the law ought to be. NLRB v. Brown, [380 U.S. 278]. Voluntarism, then, and not compulsion is the key to our national labor policy." (1965 Proceedings of the American Bar Association Section of Labor Relations Law, pp. 308-9 (ABA 1965)).

Similarly, the alternative of compulsory arbitration has not been employed as a national labor policy. Thus, "the Congressional policy has been emphatic that arbitration may not be compelled by edict but only pursuant to mutual

⁴⁸ Division 1287 of Amalgamated Assn, etc. v. Missouri, 374 U.S. 74, 82 (1963).

agreement the federal policy against compelling arbitration in the absence of agreement is even more pronounced. Repeated efforts to enact legislation to compel arbitration in a variety of circumstances have been rejected by Congress (except in the railroad-transportation industry)." In sum, as the Section of Labor Relations Law Report concluded:

"Our basic national labor policy rejects compulsion. Rightly or wrongly, Congress has declared that terms and conditions of employment are to be prescribed solely by free collective bargaining between a union and the employer of the employees it represents. Therefore, such terms may not be compelled nor imposed on non-consenting parties by judicial decree or NLRB edict."

The remedy adopted in the present case intrudes to a far-greater degree than does compulsory arbitration in the process of voluntary collective bargaining. It does not permit the parties to present and argue their position to an impartial arbitrator; rather, terms and conditions of employment are established by government fiat without regard to the rights of contracting parties and the merits of each side. The decision below thus represents a dangerous extension of present Board policy—a policy which has already seriously eroded the American concept of free collective bargaining and which threatens to convert that remarkably unique and successful system into the chaotic and ineffective method of dispute resolution that exists elsewhere in the world. 51

IV.

THE REMEDY DEVISED IS NOT LIMITED TO THE PARTICULAR FACTUAL SITUATION HERE INVOLVED BUT WILL NO DOUBT BE UTILIZED TO JUSTIFY EVEN FURTHER INTRUSIONS INTO THE PROCESS OF VOLUNTARY COLLECTIVE BARGAINING

In four cases which have been pending decision before the Board for over two and a half years, the Board is considering the question of whether it has the authority "to order an employer to reimburse his employees for the loss of wages and fringe benefits that they would have obtained through collective bargaining if the employer had not refused to bargain in good faith." These

⁴⁹1965 Proceedings of the American Bar Association Section of Labor Relations Law, pp. 305-6 (ABA 1965).

⁵⁰ Id. at 318.

⁵¹See statement of Lee C. Shaw on behalf of the American Newspaper Publishers Association, Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, Senate, 90th Cong., 2nd Sess., Cong. Oversight of Administrative Agencies (NLRB), pp. 656-80 (Committee Print, 1968).

⁵² Zinke's Foods, Inc., supra; Ex-Cell-O Corporation, supra; Herman Wilson Lumber Company, supra; and Rasco Olympia, Inc., supra. The statement of the issue is as stated in the Board's Notice of Hearing.

cases in all likelihood represent one of the areas into which the Board will proceed if this Court approves of the remedy applied in the present case. The invocation of such an order, despite its speculative and penal nature and notwithstanding the fact that one of the employers involved^{5 3} has refused to bargain as the only means available to obtain judicial review of a representation decision,⁵⁴ would represent an even greater intrusion than does the present case upon the process of free collective bargaining. But if the remedy there sought is beyond the Board's powers, the remedy it has devised in the instant case is similarly outside of its authority. The decision below thus represents a dangerous departure from our "long heritage of free men dealing with each other of their own volition, reaching their own conclusions without extensive government control and coercion; talso has the potential for even more substantial departures in the future by the Board in the guise of applying its remedial powers.

⁵³ Ex-Cell-O Corporation, supra.

⁵⁴The Act contemplates that an employer desiring judicial review of a representation proceeding must engage in a refusal to bargain in violation of Section 8(a)(5). With very narrow exceptions, this method is the only way to secure such review. Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964).

³⁵ Statement of Union Lawyers before the Section of Labor Relations Law of the American Bar Association, 1966 Proceedings of the American Bar Association Section of Labor Relations Law, p. 351 (ABA 1966).

CONCLUSION

For the above-stated reasons, the decision of the Court below should be reversed.

Respectfully submitted,

MILTON A. SMITH

General Counsel

ANTHONY J. OBADAL

Labor Relations Counsel

Chamber of Commerce of the
United States of America
1615 H Street, N. W.

Washington, D. C.

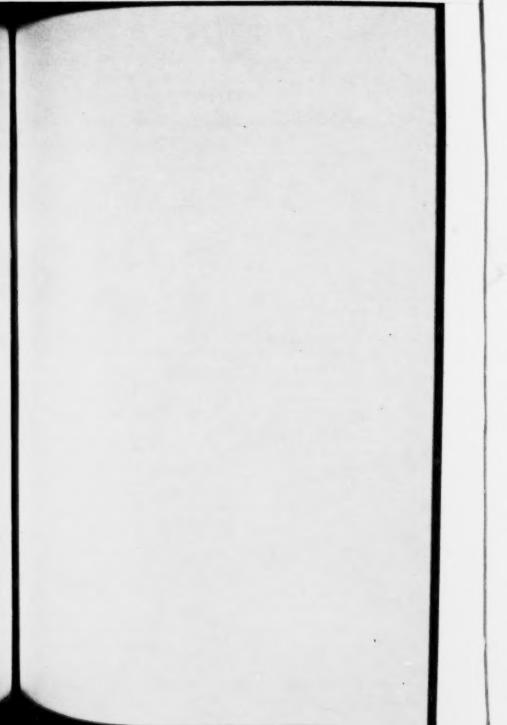
LAWRENCE M. COHEN

Lederer, Fox & Grove

111 W. Washington Street
Chicago, Illinois 60602

Attorneys for the
Amicus Curiae

LEDERER, FOX & GROVE 111 W. Washington Street Chicago, Illinois 60602 Of Counsel



INDEX

Page
NTEREST OF THE AFL-CIO 1
ABGUMENT 2
Where An Employer Rejects A Checkoff Clause Solely To Frustrate Agreement With The Union The NLRB's Remedial Authority In- cludes The Power To Order Acceptance Of That Clause
CONCLUSION
Citations
CASES:
Associated Press v. NLRB, 301 U.S. 103 (1937) 11 Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251 (1946)
Chaplin v. Hicks, [1911] 2 K.B. 786
Ex-Cello-O, et al., NLRB Case Nos. 25-CA-2377 et al
Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964) 12
Franks Bros. v. NLRB, 321 U.S. 702 (1944)
FTC v. Morton Salt, 334 U.S. 37 (1948) 9
Local 60 Carpenters v. NLRB, 365 U.S. 651 (1961) 6, 12
NLRB v. American National Insurance, 343 U.S. 395 (1952)
NLRB v. C&C Plywood, 385 U.S. 421 (1967) 6
NLRB v. Gissel Packing, 395 U.S. 575 (1969) 6, 7, 8-9
NLRB v. Herman Sausage, 275 F.2d 229 (CA 5th Cir., 1960)
NLRB v. Insurance Agents, 361 U.S. 477 (1960) 2, 3, 10
NLRB v. Jones & Laughlin, 301 U.S. 1 (1937) 7, 11
NLRB v. Truitt, 351 U.S. 149 (1959) 5

National Licorice v. NLRB, 309 U.S. 350 (1940) 4
Phelps Dodge v. NLRB, 313 U.S. 177 (1941) 5, 11-12
STATUTES:
National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq:
Section:
1
8(a)(5)
8(d) 6, 10, 11, 14
9(c) 10
10(c) 3, 4, 10, 12
MISCELLANEOUS:
Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958)
Frumer, Personal Injury 15
Lesnick, Establishment Of Bargaining Rights With-
out An Election, 65 Mich. L. Rev. 857 (1967) 9
Restatement of Torts
Shakespeare, Julius Caesar 6

IN THE

Supreme Court of the United States october term, 1969

No. 230

H. K. PORTER COMPANY, INC.

DISSTON DIVISION—DANVILLE WORKS, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD and UNITED STEELWORKERS OF AMERICA, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of one hundred twenty-two affiliated labor organizations with a total membership of approximately thirteen and one-half million working men and women, files this *amicus* brief with the consent of the parties as provided for in Rule 42(2) of the Rules of this Court.

As the court below recognized, it is generally agreed that "the [National Labor Relations] Board's remedial measures have not proved adequate in coping with the recalcitrant employer determined to defeat the effective unionization of his plant by illegally opposing organizational and bargaining efforts every step of the way" (A. 127). The primary defect of these remedies is that they encourage violations by allowing employers to benefit from illegal refusals to bargain. In the instant case the Board, prodded

by the force of circumstances, has taken a small tentative step toward the more realistic remedies that are urgently needed. The Company, and the Chamber of Commerce, seeking to prevent any diminution of the present privilege of an ineffectual remedy enjoyed by bad faith bargainers, have sought to portray this minor improvement as a major punitive expedition in the hope that this Court will so restrict the Board that it will be powerless to undertake the necessary task of remedial reform. In light of the employer position taken here we believe it is important to place this case in sharper perspective in order to afford the Court the opportunity to make a sound evaluation of what is truly at stake. Our brief will be devoted to that end.

ARGUMENT

WHERE AN EMPLOYER REJECTS A CHECKOFF CLAUSE SOLELY TO FRUSTRATE AGREEMENT WITH THE UNION THE NLRB'S REMEDIAL AUTHORITY INCLUDES THE POWER TO ORDER ACCEPTANCE OF THAT CLAUSE

On October 5, 1961, the United Steelworkers were certified as the bargaining representative of the production and maintenance employees at H. K. Porter's Danville, Virginia. plant. It is beyond dispute, indeed H. K. Porter has not chosen to contest the point in this Court, that from that date through 1966 the Company failed to meet its bargaining obligation. For the purposes of the instant proceeding, the second against the Company, the §8(a)(5) violation stems from the fact that as a "harassment of the International Union" (A. 16) and in order to deny the Union "aid and comfort" (A. 36), the Company has refused to consider the question of a dues' checkoff clause in the manner mandated by the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq. "Collective bargaining . . . is not simply an occasion for purely formal meetings between management and labor . . . it presupposes a desire to reach ultimate agreement." NLRB v. Insurance Agents, 361 U.S. 477, 485 (1960). The Company's own testimony

quoted above demonstrates that it was motivated by the antithesis of this desire; its "sole purpose," as the Board and the court below properly found, was to "frustrate agreement with the Union" (A. 135).

The foregoing makes it manifest that on the merits this is a simple case. It is now settled that the Act imposes a duty to bargain in good faith, Insurance Agents, 361 U.S. at 485; the live controversy concerning the scope of that duty is confined to the propriety of inferring bad faith from the parties' actions or bargaining positions, see, §8(d), NLRB v. American National Insurance, 343 U.S. 395 (1952). Here no such inferences were necessary since the Company's lack of good faith was proved out of its own mouth.

To remedy a §8(a)(5) violation committed by an employer "which has repeatedly flouted its Section 8(a)(5) duty" (A. 122), the Board and the court below ordered the Company to "grant to the Union a contract clause providing for the checkoff of union dues" (A. 135). The validity of this remedy is the basic question raised here. We shall now show that this remedial issue, like the now resolved issues relating to the merits, does not raise any substantial legal problem, and that the decision below is incontestably correct.

1. The Company, and the Chamber of Commerce, would have it that the remedy ordered here raises far-ranging questions about the meaning of §8(d) of the Act, the scope of "freedom of contract" in labor negotiations, and the vitality of this Court's decisions in *Insurance Agents* and American National Insurance. We most emphatically disagree. These characterizations distort the import of this case, and substitute emotion for reason, in an attempt to obscure the fact that the Board and the court below have done nothing more than follow the logic of well settled principles in light of the somewhat unusual facts presented.

Section 10(c) states that the Board upon finding a violation "shall issue . . . an order requiring [the respondent] to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies

who has bargained in bad faith is the mandatory minimum required by both the provision authorizing orders directing a cessation of the illegal activity, and the provision authorizing orders directing affirmative action effectuating the policies of the Act. The objective of a remedial order is the "prevention of unfair labor practices by the employer in the future [and] the prevention of his enjoyment of any advantage which he has gained by violation of the Act." National Licorice v. NLRB, 309 U.S. 350, 364 (1940). "One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act." Franks Bros. v. NLRB, 321 U.S. 702, 704 (1944).

A bargaining order is plainly necessary to carry out the remedial purposes of the Act as outlined in cases such as National Licorice; indeed, it is scarcely more than a tautological restatement of §10(c). In essence the Board's direction to grant the Union a checkoff clause, merely spells out the nature of the obligation imposed by its bargaining order under the circumstances. As the Board stated, those circumstances are that the Company: first, "has repeatedly violated Section 8(a) (5)"; second, "admittedly had no business reason for opposing the checkoff"; and third, that "its only reason for opposition [to the checkoff] was to frustrate agreement with the Union" (A. 135). After making these findings, the Board was faced with a choice between ordering the parties to discuss the checkoff once again from scratch or ordering the Company to agree. Only the latter alternative is sufficient to correct the violation. Anything less would not compel a complete cessation of the unfair labor practice—as we now demonstrate.

This is not a case in which an employer had a number of reasons for refusing a checkoff proposal, some of which were lawful and others which were not. In such a case an order to accept such a clause could not be equated with a simple order to bargain. For it cannot be denied that in that situation the employer's bargaining performance had not foreclosed the possibility that it could, consistent with the duty to bargain in good faith, refuse to agree.

In this case, on the other hand, the Company has placed itself in a situation where only acceptance of the checkoff clause could "purge the stain of bad faith that has already soiled its position" for only that action would be an acceptable "means of assuring the Board, and the court, that it no longer harbors an illegal intent" (A. 122). It has done so because of the fact that "its only reason for opposition [to the checkoff] was to frustrate agreement with the Union." Thus here the Company's sole reason for the refusal was an illegal one. Having advanced that reason, and that reason alone, in the original negotiations prior to this proceeding, it is now too late in the day for the Company to say that it wishes an opportunity to protect its interests through further bargaining. The Act is not so self defeating that it authorizes bargaining on a clean slate, and as if nothing had happened, after a finding of bad faith bargaining; it requires bargaining with "a desire to reach ultimate agreement" from the first. An employer who has a legitimate. interest to protect has an obligation to make that clear at some point in the initial negotiations, NLRB v. Truitt, 351 U.S. 149, 152 (1959). "To suggest that in further bargaining the Company may refuse a checkoff for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (A. 66-67, n. 16).

This being so, in the instant case, as opposed to the hypothetical case involving a refusal of a checkoff proposal for a mixture of legal and illegal reasons, there can be no doubt that it is entirely proper to equate an order requiring acceptance of the checkoff with a simple order to bargain. For they are merely two sides of a single coin where the sole reason for refusing a proposal is an unlawful one. In sum, what we have here is an adaptation of a standard bargaining order, that does not go beyond the basic rationale or remedial philosophy of such orders, to a violation that is a variant of the normal run of §8(a)(5) violations. In Phelps Dodge v. NLRB, 313 U.S. 177, 194 (1941), this Court stated "Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these

policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to ends to the empiric process of administration." The Board's action here is an instance of the proper operation of that process.

2. The foregoing demonstrates that the Company, and the Chamber of Commerce, have wrapped themselves in the mantle of \$8(d), and "freedom of contract," not to protect against a "punitive" remedy which goes beyond the exigencies of the violation, see, Local 60 Carpenters v. NLRB. 365 U.S. 651, 655 (1961), but in order to assure that the basic violation committed goes unremedied. In this respect. the employer arguments here are based on the same appreciation of the realities of industrial life, and the same remedial philosophy as the arguments rejected by this Court in cases such as Franks Bros. and NLRB v. Gissel Packing. 395 U.S. 575 (1969). This is not surprising for the negotiation of a first contract is an extension of the organizing process. A plant is not organized in any effective sense until the union which has won majority support is functioning as the employees' representative on a day-to-day basis. And "the refusal to bargain in good faith is frequently the last ditch effort of the employer to undermine the union whose organizational effort he had been unable to frustrate" at earlier stages (A. 128).

The competition for employee support is a political contest, and as is true in politics generally, time is therefore of the essence. In the §8(a)(5) context moreover, see, NLRB v. C&C Plywood, 385 U.S. 421, 430 (1967), time is one-dimensional—delay in a Board certification or in the start of good faith bargaining inevitably works for the employer. For the union and the employees supporting it "there is a tide in the affairs of men, which, taken at the flood, leads on to fortune, omitted all the voyage of their life is bound in shallows and in miseries," Shakespeare, Julius Caesar, Act IV, Scene 3, and that flood is in the early stages of the campaign and not after years of litigation.

Most employees look at their union as a service organiza-

tion through which to meet pressing needs, not as the fulfillment of a platonic ideal. Organization is usually the result of a group feeling that bargaining is needed immediately, not that it would be pleasant to bargain in two years. A few years of frustration, and of failure to make any gains, inevitably results in weakening the desire for representation. This problem is accentuated by the fact that most unions have limited resources and cannot afford to maintain extensive contact with employees of an employer who will not bargain. Thus as this Court, and the Board, have both recognized, "the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organization activities, and discourages their membership in unions," Franks Bros, 321 U.S. at 704:

"The denial of recognition is an effective means of breaking up a struggling young union too weak for a successful strike. After the enthusiasm of organization and the high hopes of successful negotiations, it is a devastating psychological blow to have the employer shut the office door in the union's face. . . . [Moreover] the bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition." Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1048, 1412-1413 (1958).

For this reason an anti-union employer recognizing the inherent appeal of organization, see, NLRB v. Jones & Laughlin, 301 U.S. 1, 33 (1937), and the fact that the building of a successful union works a peaceful revolution which threatens both his pocketbook, and the status he derives as sole master of the work place, is tempted to resort to unlawful measures to alleviate the threat. The crucial determinant in such an employer's final decision is, of course, the efficacy of the remedies provided. The optimum is a remedy which permits a rerun election or a rerun of bargaining after years of litigation essentially as if no violation had taken place. That is the goal pursued by employers in cases such as Franks Bros. and Gissel and that is the goal being pursued here.

In those cases the employers argued that it was beyond the Board's power to remedy coercive unfair labor practices which destroyed a union majority evidenced by authorization cards by a bargaining order, and that the only permissible remedy was a cease and desist order and a new representative election to be held after the effects of the employer's unfair labor practices had been dissipated. This Court rejected that argument, Gissel, 395 U.S. at 610-611:

"If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain,'... while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under these circumstances would not be likely to demonstrate the employees' true, undistorted desires." (footnotes omitted)

At first blush the Chamber of Commerce appears to be pursuing a somewhat different and more reasonable line than that taken by the Company. It notes (Chamber Br. 2-3) that "the invocation of a strong and effective remedy" is "obviously warrant[ed]" here and endorses, after a fashion, a series of proposals to alleviate the most blatant effects of delay (id. at 8-9). However, this is deceptive and the tactic is really the one this Court diagnosed in Gissel, 395 U.S. at 611-612:

"The employers argue that the Board has ample remedies, over and above the cease-and-desist order, to control employer misconduct. The Board can, they assert, direct the companies to mail notices to employees, to read notices to employees during working time at the plant, or it can seek a court injunctive order under §10(j) (29 U.S.C. §160 (j) (1964 ed.)) as a last resort. In view of the Board's power, they conclude, the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' §7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct. If an

employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign." (footnotes omitted)

The rationale of the foregoing portion of Gissel is perfectly applicable in the instant case. As Professor Lesnick

noted, in discounting the utility of rerun elections:

"[T]he fact remains, that, in a regime where there has been just concern over the adequacy of the remedial scheme, the simple notion of doing over again what has worked badly once is hardly a reassuring method of undoing the effects of the abortive attempt." Lesnick, Establishment of Bargaining Rights Without An Election, 65 Mich. L. Rev. 857, 862 (1967).

That is precisely the point here. To order rerun bargaining from scratch for an employer whose "sole purpose in refusing to bargain in good faith on the checkoff was to frustrate agreement with the Union" in the initial bargaining sessions is to allow the employer "to profit from [his] own wrongful refusal to bargain" Franks Bros., 321 U.S. at 704.

Second, the Chamber's invocation of the contempt power (Chamber Br. 9-10) is pure sophistry. This case involves the question of whether in light of the circumstances anything less than a grant of the checkoff is compliance with the duty to bargain and with the Board's order. The availability of contempt turns on the resolution of that question. Thus the Chambers argument is simply a device to evade the critical problem posed, compare, FTC v. Morton Salt, 334

U.S. 37, 54 (1948).

¹Two additional points should be made concerning Section II of the Chamber of Commerce Brief. First the attempt therein to prove that it is generally recognized that rerun bargaining from scratch, or rerun bargaining augmented in certain specified ways is adequate to cope with the violation committed in this case will not bear inspection. It is plain that the passage quoted (Chamber Br. 7) from a speech by Board General Counsel Ordman has nothing to do with remedies; it refers to the genius of good faith collective bargaining for solving difficult industrial problems. Moreover, the bits and scraps collected from Prof. Ross's study by the Chamber cannot obscure his basic conclusion: "The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act" (A. 127).

3. In Gissel the employers relied on §9(c) and a conception of "employee free choice" they claimed was entailed by that Section in their attempt to defeat a meaningful remedy; in the instant case they rely on the non-concession proviso to §8(d) and a conception of "freedom of contract" they claim is entailed by that proviso with the same end in view. Their reliance on §8(d) here is as unsound as their reliance on §9(c) in Gissel.

No one, so far as we know, questions the proposition that the statutory plan embodied in the Act is for free collective bargaining, "unrestricted by any governmental power to regulate the substantive solution of [the parties] differences" Insurance Agents, 361 U.S. at 488, as long as the employer and the union bargain in good faith. The essence of the Company's argument here goes one step further. It proceeds from the premise that in light of this plan an employer who has bargained in bad faith, as well as one who is bargaining in good faith, is immune from government regulation, of a remedial nature, which limits "freedom of contract" to any degree.

Thus, the Company's view is that its freedom from government dictation in bargaining is absolute and indefeasible. Properly understood, however, the Act protects the right of "freedom of contract" only as long as the party claiming that right has bargained in good faith. The basic policy of the Act is the encouragement of free good faith collective bargaining, not free collective bargaining simpliciter. The language of §8(d) itself makes this clear. It requires the parties "to meet . . . and confer in good faith." The non-concession provision of the statute is a proviso to that definition of the collective bargaining obligation. Plainly, then, one who defaults in his basic duty to bargain cannot claim the protection of that proviso; it is inapplicable in terms in the context of bad faith bargaining. This being so the Board's remedial powers in a bad faith bargaining case are not limited by the non-concession proviso to \$8(d). The relevant policies of the Act the Board is empowered to effectuate by §10(c) in cases involving §8(a)(5) violations includes the encouragement of good faith collective

bargaining, see §1, not the protection of an absolute right of "freedom of contract."

The utterly barren nature of the Company's position is most clearly delineated by comparing the role of "freedom of contract" and freedom to hire and fire at will under the Act. In Jones & Laughlin, 301 U.S. at 45, this Court, after reviewing the legislative history, concluded that "The Act does not compel agreement between employers and employees," and in the companion case of Associated Press v. NLRB, 301 U.S. 103, 132 (1937), the Court went on to note "The Act does not compel the petitioner to employ anvone; it does not require that the petitioner retain in its employ an incompetent [employee]." Freedom of contract under the Act is not, of course, unlimited. The parties are required to bargain in good faith; §8(d) cannot be used "as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail" NLRB v. Herman Sausage, 275 F.2d 229, 232 (CA 5th Cir., 1960). By the same token "the employer may not under cover of . . . the right . . . to select its employees or discharge them . . . intimidate or coerce its employees with respect to their self organization and representation. . . . " Jones & Laughlin, 301 U.S. at 45-46.

Thus these two rights are parallel in substantive terms: the employer can agree or refuse to agree, hire or refuse to hire, as he sees fit as long as he does so for lawful reasons. In the hiring context it was quickly settled that once the employer was found to have acted for an improper motive be could not rely on the Act's policy against government dictation of employment decisions. The critical case was Phone Dodge. There the Court was faced with the question d whither an employer could be required to offer jobs to employees whom he had for illegal reasons refused to hire. In the first instance the employer would have been free to refuse to hire the men absent discrimination. The problem was whether the remedy should be limited to an order to cease discriminating, and a direction to the employer to consider the application for employment anew, or whether an order to employ the discriminatees with back pay was called for:

"Since the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under §8(3), 29 USCA §158(3), the remedial authority of the Board under §10(c), 29 USCA §160(c), became operative. Of course it could issue, as it did, an order 'to cease and desist from such unfair labor practice' in the future. Did Congress also empower the Board to order the employer to undo the wrong by offering the men discriminated against the opportunity for employment which should not have been denied them?

Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. . . It could not be seriously denied that to require discrimination in hiring or firing to be 'neutralized,' National Labor Relations Bd. v. Mackay Radio & Teleg. Co., 304 U.S. 333, 348, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an 'affirmative action' which 'will effectuate the policies of this Act.'" Phelps Dodge, 313 U.S. at 187-188.

It is our view that the rationale of Phelps Dodge is dispositive of this case. The refusal to hire is a variant of the simple discriminatory discharge, just as the refusal to consider a proposal solely to frustrate agreement is a variant of the simple refusal to recognize. Phelps Dodge demonstrates that §10(c) reaches such unusual "stratagems for circumventing the policies of the Act" (313 U.S. at 194) as well as their more conventional analogues. Thus an employer who bargains in bad faith is no more entitled to complete enjoyment of "freedom of contract" than an employer who discriminates is entitled to the complete enjoyment of the freedom to hire and fire. Where the sole purpose of the violation is the destruction of the employees' statutory rights, the interest in providing a remedy that "will dissipate the unwholesome effects of violations of the Act" Franks Bros., 321 U.S. at 704 requires that the employer claiming these privileges be estopped. In Fibreboard Paper Products v. NLRB, 379 U.S. 203, 217 (1964), this Court noted that the proviso to §10(c) which prohibits the Board from ordering reinstatement of, or back pay for, an "individual . . . suspended or discharged for cause" was designed to protect only employers whose employment decisions are properly motivated and that it does not "curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice." It follows that the proviso to (8(d), which is not even addressed to the Board's remedial powers, is similarly restricted in that it does not protect an employer who has failed to bargain in good faith. This does not open one who has bargained in bad faith to punitive remedies. In this area as in all others, the Board must show that its order is "a reasonable attempt to put aright matters the unfair labor practice set awry" Local 60 Carpenters, 365 U.S. at 658 (Harlan, J., concurring). As we have shown, pp. 3-6, supra, the requirement that the Company grant the checkoff here meets that test comfortably.

4. In the Section of its brief entitled "Interest of the Amicus Curiae" and Section IV (pp. 1-2, 12-13), the Chamber of Commerce indicates that it is primarily concerned with this case as a vehicle for developing law that will inhibit changes in the present remedies for §8(a)(5) violations being considered in four cases pending before the Board, Ex-Cell-O, et al., NLRB Case Nos. 25-CA-2377, et al. The remedy being sought in Ex-Cell-O is sound as we shall show. Thus a comparison to Ex-Cell-O does not detract from this case. Such a comparison is however unsound as a matter of fact. The legal issue raised here, the scope of the limitation, if any, imposed on the Board's remedial powers by §8(d), is irrelevant to the issues raised in Ex-Cell-O.

In Ex-Cell-O, a compensatory remedy to make employees whole for the lost opportunity to bargain collectively which follows a $\S 8(a)$ (5) violation is being sought. The argument

in favor of that remedy may be simply stated:

First, as Congress recognized in §1 of the Act, the available relevant data indicate that the opportunity to bargain collectively is a valuable right. Where there are no unfair labor practices, the average unit of employees which has

opted for unionization has a very high expectancy, anproaching a certainty, of monetary gain through collective bargaining. Second, under (8(a)(5), an employer's refusal to bargain with employees who have properly demonstrated their desire for collective bargaining is an illegal impair. ment of that right and may properly be said to be the legal cause of the ensuing loss. Third, the courts have long recognized that impairment or destruction of an opportunity having an ascertainable monetary value is a valid basis for providing compensatory relief, see, e.g., Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251, 265-266 (1946); Chaplin v. Hicks [1911] 2 K.B. 786. Fourth, the Board's power to effectuate the policies of the Act by providing compensatory relief is equal to that of the courts. Finally, the present system tempts the rational man to violate the law. For both common sense, and empirical data indicate that immediate collective bargaining at the point mandated by law will probably result in a contract which raises an employer's wage bill. Defiance on the other hand will almost surely lead to a hiatus of two years or more during which there will be no bargaining. At the present time, this hiatus provides the employer with a short-term saving if that is his desire. It also, for this reason, inevitably results in a weakening of the employee's desire for union representation at the time the employer finally is forced to go to the bargaining table, see, pp. 6-7, supra.

The basic conclusion we draw from the foregoing is that a compensatory remedy is needed. Given the strength of the case for that remedy, and the weakness of the case against it, we can well understand the desire among employers to pretermit affirmative Board action in *Ex-Cell-O* through the §8(d) argument advanced here. However, there can be no doubt that the compensatory remedy sought from the Board is absolutely unrelated to "freedom of contract" either as the Company and the Chamber of Commerce understand that concept, or as we have defined it.

If the Board were to award compensation for the lost opportunity to contract, it would by no means be writing a contract for the parties. The pertinent analogy is the law of damages which awards compensation for the loss of earning capacity due to a tort, see, Bigelow v. R.K.O. Radio Pictures, 327 U.S. at 265-266. That law is not based on the assumption that the plaintiff would have earned profits except for the injury, but only on the assumption that he might have done so. This point is repeatedly emphasized in the authorities. As stated in the Restatement of Torts, §924, p. 633:

"It is immaterial that the plaintiff would not have worked during the period of incapacity if he could have worked. In such case his earning capacity was hurt whether or not he would have chosen to exercise it and he is entitled to damages measured by the extent to which his capacity for earning has been reduced."

The measure of damages for impairment of earning capacity "is not what plaintiff would have earned but what he could

have earned." 3 Frumer, Personal Injury, 128.

Thus, in making the employees whole for the denial of their opportunity of collective bargaining and the reasonable expectancy of resulting earning increments, the Board would not be purporting to restore them to the condition which would have obtained but for the employer's violation of the statute, nor writing any contract to that end. It would be merely making them whole for the wage gains which they reasonably might have achieved had their rights been respected. Far from writing a contract for the parties, the Board would be simply making the workers whole for the injury caused when they were denied a statutory right which our labor relations experience demonstrates to have actual monetary value. The wrong which the Board would be redressing is not the denial of a right to a contract but the right to bargain collectively in pursuit of a contract.

The remedy sought would not impose new terms and conditions of employment on the parties by Board fiat; the affected employees would receive a single payment for the period during which the employer wrongfully refused to bargain; the day when the employer begins to bargain the period for computing his liability would end and this would be true even though no contract ever resulted; moreover, for the purposes of the ensuing bargaining, the employees' wage rates as of the day bargaining begins would not be

their previous wage rate plus the additional amount representing the improved benefits they could have won in collective bargaining but simply their previous wage rates alone. All of the foregoing makes it clear that the Board is not being asked in Ex-Cell-O to use its power to set new terms and conditions of employment or to influence future settlements, but only to make the employees whole for the period during which they were wrongfully denied their valuable right to collective bargaining.

The short of the matter is that this case presents a limited issue which should be decided on its merits, rather than being obscured by the unrelated issues of greater moment

raised by other cases.

CONCLUSION

For the foregoing reasons, as well as those stated by the United Steelworkers of America and the National Labor Relations Board, the decision below should be affirmed.

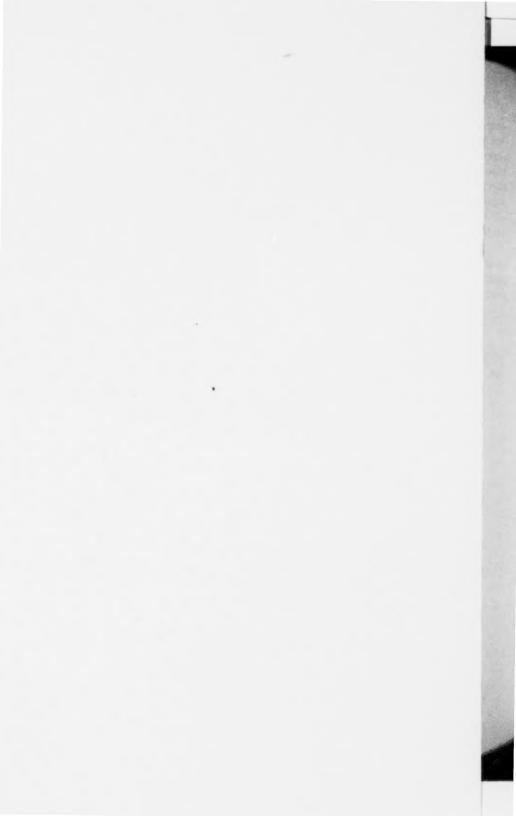
Respectfully submitted,

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
LAURENCE GOLD
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

December, 1969





DEC 31 1969

JOHN F DAVIS CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC.

DISSTON DIVISION—DANVILLE WORKS,

Petitioner.

v.

NATIONAL LABOR RELATIONS BOARD
AND
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA

ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
GEORGE H. COHEN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
Attorneys for United Steelworkers
of America

Bernard Kleiman 10 South LaSalle Street Chicago, Illinois 60603 Of Counsel



TABLE OF CONTENTS

A Company of the Association of the Company of the	Page
COUNTERSTATEMENT OF THE CASE	1
1. The First Unfair Labor Practice Proceeding	2
2. The Second Unfair Labor Practice Proceeding	3
3. The First Decision of the Court Below	6
4. Events Following the First Decision of the Court Below	7
5. The Second Decision of the Court Below	9
6. The Board's Decision on Remand	10
7. The Collective Bargaining Relationship Subsequent to Oc-	
tober, 1966	11
COUNTERSTATEMENT OF THE ISSUES PRESENTED	11
SUMMARY OF THE ARGUMENT	12
ARGUMENT	16
I. THE BOARD HAS POWER TO REMEDY VIOLA- TIONS BY EXACTING CONCESSIONS OR IMPOS- ING AGREEMENT WHERE THAT REMEDY IS AP- PROPRIATE IN ALL THE CIRCUMSTANCES OF	
THE CASE	16
A. Section 8(d) Relates to Whether a Party Has Bar- gained in Bad Faith, Not to the Remedy Which May be Devised if He Has	16
B. In Fashioning Remedies, the Board Must Seek to Effectuate the Policies of "the Entire Act", and the Policies Expressed in Section 8(d) Are Not Entitled to Exclusive Weight	
C. The Board, With Judicial Approval, Frequently Has Fashioned Remedies Which Exact Concessions or Im-	
pose Agreement	25
(1) Remedying Refusals to Sign	25
Employer Units	26
(3) Remedying Unilateral Changes	27
(4) Depriving the Wrongdoer of the Fruits of Illegal Conduct	30
D. This Court, Fashioning Federal Law Under Section 301, Has Subordinated "Freedom of Contract" to Other Policies of the Act Where On Balance that Course Was Deemed Appropriate	
II. THE BOARD'S EXERCISE OF ITS POWER WAS AP- PROPRIATE IN THIS CASE, AND DOES NOT POR-	
TEND "CONTRACT WRITING" AS A REMEDY GEN-	
ERALLY	33

Pa Pa	100
A. In the Circumstances Here, the Board's Remedy Was	•
B. Protections Built Into Section 10(c) Assure That the	38
III. IN ANY EVENT, THE BOARD'S ORDER IN THIS	
IV. THE ISSUES IN THIS CASE ARE DIFFERENT FROM THE ISSUES IN THE EX-CELL-O CASES PENDING	41
CONTRACTOR	43
TABLE OF CITATIONS	
Cases	À
Amalgamated Utility Workers v. Consolidated Edison Co., 309	
U.S. 261 (1940)	8
	28
Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938) 20, Cosmopolitan Studios, Inc., 127 NLRB 788 (1960), enforcement	
	27
Ex-Cell-O Corp., 25-CA-2777	43
Fibreboard Paper Products Co. v. NLRB, 379 U.S. 203 (1964) affirming, 322 F. 2d 411 (D. C. Cir. 1963) 28-29,	
Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944) 14,	22
Frontier Homes Corp., 153 NLRB 1070 (1965), enforced in relevant part, 371 F. 2d 974 (8th Cir. 1967)	28
Garment Workers v. NLRB, 366 U.S. 731 (1961) 13,	-
Garwin Corp., 153 NLRB 664 (1965), enforcement denied, sub. nom., Local 57, International Ladies Garment Workers' Union v. NLRB, 374 F. 2d 295 (D. C. Cir. 1967), cert. denied, 387	
U.S. 942 (1967)	23
H. W. Elson Bottling Co., 155 NLRB 714 (1965), enforced 379 F. 2d 223 (6th Cir. 1967)	24
Herman Wilson Lumber Co., 26-CA-2536	42
Ice Cream, Frozen Custard Employees, 145 NLRB 865 (1964) .	31
International Association of Machinists v. NLRB, 311 U.S. 72	21
J. I. Case Co. v. NLRB, 321 U.S. 332 (1944)	38
J. P. Stevens Co., 163 NLRB 217 (1967), enforced 388 F. 2d	-
896 (2nd Cir. 1967), cert. denied, 393 U.S. 836 (1968)	24

Page
J. P. Stevens & Co., 167 NLRB Nos. 37, 38 (1967), enforced in
relevant part, 406 F. 2d 1017 (4th Cir. 1968)
J. P. Stevens Co., Inc. v. NLRB, -F. 2d-, 72 LRRM 2433
J. P. Stevens Co., Inc. 5, 171 NLRB No. 163 (1968) 24, 38 (5th Cir. 1969), enforcing, 171 NLRB No. 163 (1968) 24, 38
John J. Corbett Press, Inc., 163 NLRB 154 (1962), enforced
John J. Gorbett Fress, Inc., 163 142121 151 (1527) 401 F. 2d 673 (2nd Cir. 1968)
John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) 14, 33-34
Machinists Local v. NLRB, 362 U.S. 411 (1960)
Montgomery Ward & Co., Inc. 145 NLRB 846 (1964), enforced
in white there. 333 F. Ed 003 (Out Cit. 1000)
Mor Paskesz, 171 NLRB No. 20 (1968), enforced 405 F. 2d 1201
NLRB v. American National Insurance Co., 343 U.S. 395 (1952). 18
NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956) 24
NLRB v. Beverage-Air Company, 402 F. 2d 411 (4th Cir. 1968) 26
NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) 31-32
NI RR v. Erie Resistor Corp., 373 U.S. 221 (1963) 40, 42
NI.RR v. Express Publishing Co., 312 U.S. 426 (1941) 36
NI PR n Fansteel Corp., 306 U.S. 240 (1939) 39
NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) 15, 40, 42
NLRB v. George E. Lightboat Storage Inc., 373 F. 2d 762 (5th
Cir 1967) 26
NLRB n. Gissel Packing Co., 395 U.S. 575 (1969) 14, 22, 38
NI.RR v. Great Dane Trailers, 388 U.S. 26 (1967) 40, 42
NLRR ". H. I. Heinz Co., 311 U.S. 514 (1941) 25
NLRB v. Herman Sausage Co., 275 F. 2d 229 (5th Cir. 1960)
17-18, 42
NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960)
17, 18, 20, 21, 37, 41
NLRB v. J. H. Rutter-Rex Mfg. Co., 38 U.S. L. Week 4067
(1969)
NLRB v. Katz, 369 U.S. 736 (1962)
NLRB v. P. Lorillard Co., 314 U.S. 512 (1942)
NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953) 13, 21
NLRB v. Sheridan Creations Inc., 357 F. 2d 345 (2d Cir. 1966),
NLRB v. Sheridan Creations Inc., 357 F. 2d 345 (2d Car. 1500),
CELL GEHECH, 303 CIS. 1005 (1307)
MLRD 0. Skidi, 310 1. Ed 115 (our car. 1500)
NLRB v. Strong, 393 U.S. 357 (1969)
NLRB v. Warrensburg Board & Paper Corp., 340 F. 2d 920 (2nd
Cir. 1965)
National Licorice Co. v. NLRB, 309 U.S. 350 (1940) 30
Overnite Transportation Co., 157 NLRB 1185 (1966), enforced
372 F. 2d 765 (4th Cir. 1967), cert. denied, 389 U.S. 838
(1969)

Page	
Phetps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)	
Rasco Olympia Inc., 19-CA-3187	
Schill Steel Products, Inc., 161 NLRB 939 (1966)	;
Scott's Inc., 159 NLRB 1795 (1966), enforced 383 F. 2d 230	
(D.C. Cir. 1967)	
(5th Cir. 1969)	
Tavtile Workers v Lincoln Mills 959 TIC 440 (1057)	
The Kroger Co., 164 NLRB No. 54 (1967), enforced in relevant part, 401 F. 2d 682 (6th Cir. 1968)	
Tulsa Sheet Metal Works, 149 NLRB 1487 (1964), enforced 367 F. 2d 55 (10th Cir. 1966)	
United Nuclear Corp., 156 NLRB 961 (1966), enforced 381 F. 2d 982 (10th Cir. 1967)	
United Steelworkers v. NLRB (Roanoke Iron & Bridge Works Inc.), 390 F. 2d 846 (D.C. Cir. 1968)	
United Steelworkers v. NLRB, 357 U.S. 357 (1958)	
Universal Insulation Corp. v. NLRB, 361 F. 2d 406 (6th Cir. 1966)	
Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 (1943) 20, 30-31	
Wackenhut Corp. v. United Plant Guard Workers, 332 F. 2d 954	
(9th Cir. 1968) 94	
Walker Electric Co., 142 NLRB 1213 (1963) 27	
Zinke's Foods Inc., 30-GA-372	
Statutes	
National Labor Relations Act:	
Section 1, 29 U.S.C. §151	
Section 8(a) (1), 29 U.S.C. §158(a) (1)	
Section 8(a) (5), 29 U.S.C. §158(a) (5)	
Section 8(d), 29 U.S.C. §158(d)	
Section 10(c), 29 U.S.C. §160(c)	
Section 201, 29 U.S.C. §171	
Section 301, 29 U.S.C. §185	
Miscellaneous	
PNA Collection Promision Name of the Control of the	
BNA, Collective Bargaining Negotiations and Contracts 5 Note, Forced Concession As a Possible NLRB Remedy, 68 Colum.	
L. Rev. 1192 (1968)	
Powers: The H.K. Porter Case, 35 Chi. L. Rev. 777 (1968) . 20)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC.

DISSTON DIVISION—DANVILLE WORKS,

Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD

AND

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA

COUNTERSTATEMENT OF THE CASE

The NLRB's order, challenged here, was designed to cure a bizarre course of illegal conduct. Petitioner's Statement of the Case describes that conduct only superficially. We believe a more detailed statement is necessary. The relevant facts are undisputed.

On October 5, 1961, following a secret ballot election, United Steelworkers of America ("the Union") was certified by the NLRB as exclusive bargaining agent of the production and maintenance employees at the Danville, Virginia plant of H. K. Porter Co. ("the Company"). After five years of negotiations, the Union still had not ob-

tained a first agreement. Throughout those negotiations, the Company bargained in bad faith. Its trail of misconduct was traced in a series of legal proceedings, culminating in the order now before this Court.

1. The First Unfair Labor Practice Proceeding

The "bargaining" which took place between the certification date (October 5, 1961) and November 27, 1962, was the subject of the first unfair labor practice proceeding. In that case, a Trial Examiner of the Board found that the Company had violated Section 8(a) (5) and (1) of the Act by failing to bargain in good faith. The Company had made unilateral changes in terms and conditions of employment, and had insisted upon a no-strike clause while simultaneously refusing to grant any form of contractual machinery for resolving grievances. The Trial Examiner concluded that the Company "was demanding in effect that the Union relinquish the basic rights conferred by the Act or it would not receive a contract" and that the Company's actions were designed to "subvert the Union's position as the statutory representative." (App. 45-46; Trial Examiner's Decision in H. K. Porter Co., 5-CA-2344).

The Examiner ordered the Company to bargain in good faith. The Company did not file any exceptions; accordingly, the Examiner's ruling automatically was adopted by the Board, and the Board's order, in turn, was enforced by the U.S. Court of Appeals for the Fourth Circuit (App. 41, 58).

During the pendency of the first Board proceeding, a period of nearly a year, the Company refused to meet with the Union at all (App. 116, 17-18). However, after the Examiner's decision issued, it agreed to resume negotiations (App. 18). Twenty-one negotiating sessions ensued during

¹ There were no negotiations between November 27, 1962 and September 23, 1963 (App. 42, 45-46).

the next year, and these became the subject of the second unfair labor practice proceding (App. 46, 116).

2. The Second Unfair Labor Practice Proceeding

When the parties resumed their negotiations in September, 1963, there were 14 issues in dispute. As of the last meeting in September, 1964, the differences had been narrowed to three unresolved issues-dues checkoff, insurance and wages (App. 46-47, 116-117). Ten of the other issues had been "resolved" by the Union withdrawing its demands (App. 61, 116-117).2 The eleventh was resolved by the Company making its only movement. Even this one step was not voluntary. As noted, the Examiner in the first case had held that it was an unfair labor practice for the Company to insist upon a no-strike clause while coupling that position with a refusal to agree to any contractual machinery for resolving grievances. The Company did not challenge that decision, and thus became legally obligated to comply with it either by agreeing to some form of grievancearbitration or by dropping its demand for a no-strike clause. The Company ultimately complied by withdrawing its demand for a no-strike clause. This single act of accommodation did not come easily for the Company. As explained by the court below: "In spite of the Board's order in the prior proceeding, it was not until ten months and 20 bargaining sessions following its issuance that the Company receded from the position which the Board had found to amount to an unfair labor practice" (App. 60).

While this delay itself evidenced the Company's continuing bad faith, the second Board proceeding focused primarily upon another aspect of the bargaining. Throughout the negotiations a key issue at virtually every session had

²As the Umon's negotiator testified, "In the hopes of getting an agreement, the Union gradually held twenty meetings, and dropped all those demands . . ." (App. 61).

been the Union's request for the "checkoff"—the deduction by the Company of union dues from the wages of employees who voluntarily authorized such deductions in writing (App. 47, 21).

The Union's demand for such a provision was addressed to its own self-preservation. The Union maintains no office or fulltime staff representative in Danville and the plant would be serviced from the Steelworkers' Roanoke office situated 85 miles away. The 300 bargaining unit employees reside in homes scattered over a 40 mile radius from the plant. Thus, absent a systematic method of dues checkoff, the Union was faced with an insurmountable practical problem in attempting to collect dues from these employees (App. 45, 61, 22-24).

The Company steadfastly rejected the Union's checkoff demand at every negotiating meeting. The Company gave only one reason at the bargaining table for its refusal—that collecting dues "was the Union's business which [the Company] should not foster or promote" (App. 47, 30-32). At the unfair labor practice hearing, with uncommon candor, the Company explained what it meant by "Union business." Its counsel explained that "our purpose was that we were not going to aid and comfort the International Union at this location" (App. 36). He elaborated:

"[W]e have stated our purpose; we have stated it plainly here many times, that we were not going to aid and comfort the Union . . ." (App. 37).

He acknowledged that "our refusal to grant the checkoff clause has been harassment of the International Union" (App. 16). When advised by the Trial Examiner that the most that could be ordered would be further bargaining, and "that doesn't mean that you have to agree to it," counsel

The plant manager, who was the Company's chief negotiator, likewise testified that "the reason for refusing to grant checkoff" was that he was "not going to aid and comfort the Union . . ." (App. 32).

responded: "So we bargain for another 20 or 200 or 400

meetings --- " (App. 39).

The Company admitted at the hearing that it had absolutely no reason for resisting the checkoff except its desire not to give "aid and comfort" to the Union (App. 30, 31, 32, 36, 37). The plant manager testified that there would be no administrative inconvenience involved in checking off dues, that there was no company-wide policy against the dues checkoff and that, in fact, it did check off union dues at some of its other plants (App. 47-48, 30, 33). He further testified that at this plant the Company made deductions from employees' wages, pursuant to voluntary authorizations, for a variety of other purposes (App. 48, 26-29).

The Trial Examiner found that the Company was negotiating in bad faith (App. 48-51). He concluded from "the entire record" that "Plant Manager Jones, Respondent's chief negotiator, took the position he did with respect to the checkoff issue, for the purpose of frustrating agreement with the Union" (App. 49). He likewise condemned the Company's asserted refusal to give "aid and comfort" to the Union as, "if not actually a false reason," inconsistent with good faith (App. 50).

The Examiner recommended an order which simply directed the Company—as had the order in the prior case—to bargain in good faith (App. 52-54). The Examiner explained that his decision did not mean that "in the resumed

⁴The checkoff is now such an accepted practice in labor-management relations that it is included in 92% of all contracts in manufacturing industries (B.N.A., Collective Bargaining Negotiations and Contracts, page 87:3).

⁵Until the advent of the Union, the Company checked off weekly contributions to a "Good Neighbor Fund," administered by an informal employee organization for parties, charitable donations and gifts to hospitalized employees (App. 26). The Company also made deductions for the purchase of U.S. Savings Bonds, the purchase of optional insurance coverage for employees' dependents, and contributions to the United Fund (App. 26-27).

bargaining sessions which I shall recommend, Respondent will be required to agree to some form of checkoff. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good faith bargaining the parties reach an . . . impasse, the requirements of the Act will have been fulfilled" (App. 51, n. 9).

The General Counsel and the Union both filed exceptions to the decision, contending that the special circumstances of this case warranted an order requiring the Company to agree to the checkoff. The Board, however, af-

firmed without discussion (App. 55-56).

3. The First Decision of the Court Below

In its first decision, the court below enforced the Board's order, Judge Miller dissenting (App. 57-67). The court held that the Board's finding of a purpose to frustrate agreement was supported by substantial evidence. The court further found, as contended by the Union, that "it is clear from the record that the company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off" (App. 66). Nevertheless, the court did not adopt the Union's request that the Board's order be modified to include "a provision requiring the company to withdraw its objection to the dues check-off" (App. 64).

The court acknowledged that "the prior order of the Board, drawn, as is the order in suit here, in terms of the statute, requiring the company to bargain in good faith, was ineffective (App. 63-64), and it agreed that "certainly a succession of Section 10(b) proceedings resulting in Board orders cast in statutory language is not the answer where the refusal to bargain persists" (App. 64). But the court believed that modification of the Board's order was "not necessary" (App. 66), as in the circumstances of this case good

faith required acquiescence:

"To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute." (App. 66-67, n. 16).

To make clear its intention, the court directed that the Trial Examiner's statement that the order does not require the Company to agree "should be disregarded" (App. 67, n. 16).

4. Events Following the First Decision of the Court Below

The Company moved for a stay of the mandate so that it could seek review from this Court. In support of its motion the Company stated that "the effect of the opinion and order of the court is to require the Company to agree to a dues checkoff provision. This, the Company contends, would be most unfair . . ." (App. 83).

The Company's petition for a writ of certiorari (No. 352, October Term, 1966), sought review of both the finding of violation and the propriety of the remedy. As to the latter, it argued that the opinion of the court below was "indirectly compelling" it to agree to a checkoff clause in contravention of Section 8(d) (Petition, page 17). This Court denied the petition on October 10, 1966 (385 U.S. 851).

Thereafter the Company and the Union met. It was now more than five years since the certification of the Union. The Company, despite having told the court below and this Court that the order compelled it to agree to a checkoff, had a different version when it met with the Union:

"It is our position that the court order requires us to bargain with the Union in good faith in an attempt

⁶Footnote 16 of the court's opinion is printed incorrectly in the appendix and our quote is taken from the correct version appearing at 363 F. 2d 272, 276.

to establish a system of dues collection at the plant which is acceptable to both the Company and the Union. The Company will not be coerced into making an outright gift of a dues check-off provision simply because the Union thinks that the court has ordered us to do so. That, in our view, is not bargaining" (App. 89).

The Union thereupon filed a motion in the court below for clarification of its decree. The Union explained that it understood the court's decree to require the Company's agreement to checkoff; that the Company had indicated the same understanding of the decree until it actually met with the Union; but that at that meeting the Company announced a different understanding, as expressed in the above quote (App. 81-87). The court below denied the motion on the ground that "a contempt proceeding, rather than proceedings in connection with a motion to clarify the decree, would be more appropriate to test the Company's compliance with the decree" (App. 109-110).

Accordingly, the Union requested that the Board initiate contempt proceedings (App. 110). The Board declined to do so, and instead advised the Union that it was closing the case because the Company had "satisfactorily complied with the affirmative requirements of the order" (App. 111).

The Union thereupon filed another motion in the court below seeking clarification of its decree. The motion stated that the Board, by closing the case, had adopted the Com-

Under the Act, only the Board may initiate contempt proceedings. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S.

261.

⁷ The only objection to checkoff voiced by the Company when the parties met was that dues collection was "Union business." (App. 84). This, of course, was the same objection which it had advanced during the prior period involved in the Board proceeding. The Board had found that this reason, "if not actually . . . false," evidenced an attitude inconsistent with good faith (App. 50).

pany's interpretation of the decree, and that there remained no other avenue by which the Union could adjudicate its claim that the decree required the Company to agree to a checkoff. This time, the motion met with a better fate.

5. The Second Decision of the Court Below

The Court (Judge Miller dissenting) granted the motion, clarified its decree, expressed its views on what powers were available to the Board when confronted with continuing refusals to negotiate in good faith, and remanded the case to the Board "for reconsideration in the light of this opinion" (App. 115-130).

Most pertinently, the court below stated that the Board could, in appropriate circumstances, order a party to make a concession to remedy a refusal to bargain, notwithstanding Section 8(d) of the Act. The court explained that Section 8(d) "relates to the determination of whether a Section 8(a) (5) violation has occurred and not to the scope of the remedy which may be necessary to cure violations which have already occurred." (App. 122-123; emphasis in original).

The court recognized that the Act "is grounded on the premise of freedom of contract" and that "remedies which impinge on it are not to be casually undertaken" (App. 124). But the court concluded that such remedies may be provided when, on balance, they effectuate the policies of the Act in its entirety:

"[A]n equally important policy of the Act is to equalize the bargaining power of employees and employers by assuring and guaranteeing the right of workers to organize and bargain collectively through their elected representatives, and the major purpose behind the Section (8)(a)(5) duty to bargain is to make meaningful this fundamental right of employees . . . To make sure that this primary right is fulfilled, the NLRB has

been given broad remedial powers. Section 10(c) of the Act charges the Board with the task 'of devising remedies to effectuate the policies of the Act'... Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will best effectuate the one at least cost to the other. Though ordering an employer to grant a checkoff obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively." (App. 124-127).

6. The Board's Decision on Remand

On remand, the Board issued a Supplemental Decision and Order directing the Company to "Grant to the Union a contract clause providing for the checkoff of union dues" (App. 132-137). The Board noted its prior finding "that the real and only reason for refusing the checkoff was to 'frustrate agreement with the Union'" (App. 133). It concluded:

"As respondent has repeatedly violated Section 8(a)(5) and admittedly had no reason for opposing the checkoff, and as its only reason for such opposition was to frustrate agreement with the Union, we conclude . . . that an order to grant checkoff is warranted in the circumstances of this case. To permit Respondent to hold out for some 'reasonable concession' by the Union in return for the checkoff requirement would imply that the Respondent is now being ordered to surrender a position that it had legitimately maintained. Such an implication would be contrary to our finding, affirmed by the Court of Appeals, that Respondent's opposition to granting checkoff was based solely on a desire to thwart the consummation of a collective bargaining agreement." (App. 135).

The Board's new order was enforced by the court below

per curiam (Judge Miller dissenting) (App. 141). This Court granted the Company's petition for writ of certiorari (App. 142).

7. The Collective Bargaining Relationship Subsequent to October, 1966

The record in this case contains no evidence relating to the parties' relationship subsequent to October, 1966. Petitioner, however, has gone outside the record to advise this Court that agreements have been reached (brief, page 8). Accordingly, we feel compelled to add that those agreements were made possible only because of the pendency of

this litigation.

The Company has never receded from its position that, unless coerced by a judicial decree, it will not grant a check-off. The first agreement—effective December 1, 1966—was made possible because the Union reserved for itself on the face thereof the right to pursue its claim in this litigation. The three year agreement dated May 1, 1969, was achieved, after a strike, when the Company agreed to a checkoff provision which would become effective "if after exhaustion by the Company of all available legal remedies the order of the National Labor Relations Board requiring the Company to grant the Union a provision for checking off union dues becomes final."

In other words the Union, able to look to this litigation for vindication of its claim, had opted to forego the checkoff pendente lite and thereby had deprived the Company of the ability to forestall agreement by its continuing intransigence on this issue.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

The Union believes that there are two questions presented by this appeal:

1. Does the National Labor Relations Board have

the power, in appropriate circumstances, to remedy a statutory violation by requiring the wrongdoer to make a contractual concession?

2. Where an employer acknowledges that it has no lawful objection to a union proposal, does a Board order requiring him to accede to that proposal exact a "concession" within the meaning of Section 8(d) of the Act?

SUMMARY OF ARGUMENT

1

The principal issue in this case is whether the Board is totally devoid of power to remedy a violation by exacting concessions or imposing agreement, no matter how appropriate that remedy may appear in the circumstances of a particular case. The Company contends that Section 8(d) deprives the Board of such power. As we show, this contention is erroneous.

Section 8(d) states that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." It was enacted to prevent the Board from passing judgment upon the substance of an employer's bargaining position, so long as that position is maintained with subjective good faith. In the present case, it is clear that the Board did not transgress Section 8(d) in finding the violation. The Board found a violation because the Company was bargaining with subjective bad faith, i.e., with a state of mind designed to frustrate reaching agreement.

The Company seeks here to have Section 8(d) serve an entirely different purpose. It argues that Section 8(d) applies not only to the finding of violations, but also to the fashioning of remedies. The Company admits that the literal language of Section 8(d) is not addressed to the remedy power. Nor is there a word in the legislative history, or in the decisions of this Court, which suggests such a secondary purpose for Section 8(d). Nevertheless, the Company argues that Section 8(d) expresses a "policy of freedom of contract"; that Section 10(c) authorizes only such remedies "as will effectuate the policies of this Act"; and that, accordingly, the Board may not compel concessions or agreement to remedy violations.

It is questionable whether Section 8(d) expresses any "policy" relevant to the remedy power. To be sure, Section 8(d) expresses a policy that employers negotiating in good faith are to enjoy "freedom of contract," and are not to have their bona fides challenged by reason of their unwillingness to make concessions or agreement. That is quite different, however, from concluding that Section 8(d) also expresses a policy of insulating employers negotiating in bad faith from remedies designed to cure their wrongs.

But even if the policy of "freedom of contract" relates to remedies as well as findings of bad faith, the Board's power to issue the remedy here should be sustained. For this policy, even if relevant, is not entitled to exclusive weight; it is but one of the several policies which must be accommodated in fashioning remedies to the particular facts of each case. "[I]t is the entire Act and not merely one portion of it, which embodies 'the definitive statement of national policy." Machinists' Local v. NLRB, 363 U.S. 411, 418 n. 7. To the extent that a "tension" exists between competing policies, the Board in fashioning remedies is required "to give coordinated effect to the se policies ... " NLRB v. Seven-Up Bottling Co., U.S. 344, 348, and in so doing has the power to subordinate one policy to another. In implementing "the entire Act" this Court has frequently approved Board remedies which conflict with one of the Act's specific policies. For example, no policy of this Act is clearer than that an employer may not grant exclusive recognition to a minority union, Garment Workers v. NLRB, 361 U.S. 731, 737, yet this Court repeatedly has affirmed the Board's power to remedy violations by ordering bargaining with a minority union. E.g., Franks Bros. Co. v. NLRB, 321 U.S. 702; NLRB v. Gissell Packing Co., 395 U.S. 575. And more directly in point, this Court and the courts of appeals have consistently upheld Board remedies which exact concessions or impose agreement upon non-consenting employers. (These cases are discussed in detail infra, pp. 25-32). Moreover, in implementing the identical statutory policies under Section 301, this Court has subordinated "freedom of contract" to other policies of the Act where, on balance, that course was deemed appropriate, John Wiley & Sons v. Livingston, 376 U.S. 543. Thus, the instant case is not the innovation which the Company tries to make it.

H

The Company has confined its argument solely to the claim that the Board may never exact concessions or impose agreement. It does not contend that, if such power exists. this was an inappropriate case for its exercise. The Company's reluctance is not surprising. The Board was confronted with an employer: (a) who was a recidivist, having twice refused to bargain during its first negotiations with the Union; (b) who admitted that it had no reason for refusing the Union's request for a checkoff except for its illegal purpose of frustrating any agreement with the Union; (c) who nevertheless, in response to the Board's second order to bargain, continued to refuse the request without tendering any lawful reason for its refusal. In these circumstances, the Board was warranted in concluding that an order requiring checkoff was essential to effectuate the policies of the Act and conversely that the failure to do so would have rendered the remedial provisions of the Act totally meaningless.

The Company, and the Chamber of Commerce, amicus curiae, raise the spectre that however appropriate the remedy in the circumstances of this case, its approval by this

Court will portend "contract writing" as a remedy to be imposed generally in run-of-the-mill refusal to bargain cases. This fear is unwarranted. The Board's power under Section 10(c) is broad, but it is not unlimited. The Board may not impose remedies which are "punitive," or which are "arbitrary, unreasonable or capricious." These limitations effectively assure that, in remedying run-of-the-mill refusals to bargain, the Board cannot dictate the terms of collective bargaining agreements. For example, the employer who violates Section 8(a)(5) by refusing to meet with the union, or by delaying negotiations, or by refusing to provide information to which the union is entitled, has not thereby demonstrated that he lacks legitimate reasons for resisting the union's demands. In such cases, it might be "punitive," or "arbitrary, unreasonable or capricious," to order the employer to agree to the union's demands. Such a remedy might not be necessary to cure the prior violation, and it would have the unwarranted effect of denying the employer an opportunity to protect his legitimate interests by good faith negotiations.

It is entirely possible to conclude that the Board's order was appropriate in the circumstances of this case (where the employer had only an illegal reason for refusing the requested checkoff) without determining the limits of the appropriateness of this remedy in other circumstances. However, if the Court desires to draw a line there is one which readily commends itself: this Court has recognized in other contexts that the existence of "legitimate and substantial business justifications" is an appropriate touchstone for upholding employer action. E.g., NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378. Whether the employer in good faith has "legitimate and substantial business justifications" for resisting the union's demands seems an equally relevant inquiry in determining when the Board may remedy refusals to bargain by exacting concessions and/or imposing agreement.

Ш

We have assumed above that the Board's order exacted a "concession" from the Company. It is not at all self-evident, however, that what was required of the Company here amounted to a "concession" within the meaning of Section 8(d). The Company was required to relinquish its illegal reason for refusing the Union's request, but no one, not even the Company, contends that 8(d) protects the right to adhere to illegal positions. Since the Company admits it had no other reason for resisting the request, its acquiescence is that request does not constitute a "concession."

ARGUMENT

The Company challenges the Board's order on a single ground: that Section 8(d) precludes the Board from remedying violations by exacting concessions or imposing agreement. This challenge is ill-founded. As we show in Part III, it is doubtful that the Board's order in this case exacted a "concession" within the meaning of Section 8(d). In Parts I and II, we assume that it did, and demonstrate that nonetheless this remedy was within the Board's power.

- I. THE BOARD HAS POWER TO REMEDY VIOLA-TIONS BY EXACTING CONCESSIONS OR IMPOS-ING AGREEMENT, WHERE THAT REMEDY IS APPROPRIATE IN ALL THE CIRCUMSTANCES OF THE CASE.
 - A. Section 8(d) Relates to Whether a Party Has Bargained in Bad Faith, not to the Remedy Which May Be Devised if He Has.

By its literal terms, as the Company admits (brief, p. 18), Section 8(d) is addressed to a different question than that presented in this case. Section 8(d) defines the obligation to bargain in good faith; it does not purport to define the scope of the Board's remedial power. It states that the

obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." What this means, at least literally, is that the Board cannot find that an employer has failed to bargain in good faith merely because he "does not . . . agree to a proposal or mak[e] a concession."

And this is not just a literal reading. It is precisely what Congress sought to accomplish when it enacted Section 8(d):

"[C]riticism of the Board's application of the 'good faith' test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice. Thus, in 1947 in Congress the fear was expressed that the Board had 'gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the counter-proposals that he may or may not make.' H. Rep. No. 245, 80th Cong., 1st Sess., p. 19. Since the Board was not viewed as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good faith test of bargaining into Section 8(d) of the Act." NLRB v. Insurance Agents' International Union, 361 U.S. 477, 486-487.

Section 8(d) "checked . . . this apprehended trend" by precluding the Board from finding an 8(a)(5) violation against an employer who maintains a bargaining position in good faith even though, in the Board's view, that position is "unreasonable, or unfair, or impractical, or unsound." NLRB v. Herman Sausage Co., 275 F. 2d 229, 231 (5th

⁹Throughout this brief, all emphasis is added unless otherwise indicated.

Cir. 1960). An employer negotiating in good faith may refuse to agree to a proposal, or to make concessions, or indeed, to come to an over-all agreement with the union. The essence of Section 8(d) is that it permits a bargaining impasse arrived at after good faith negotiations. 10

The classic example of Board transgression of the line drawn by Congress in Section 8(d)—i.e., finding bad faith from a refusal to make concessions—was NLRB v. American National Ins. Co., 343 U.S. 395. There the Board found bad faith because, in its view, the employer's demanded management rights clause was too sweeping. This Court held that Section 8(d) precluded such a finding. "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements... Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, per se, an unfair labor practice." 343 U.S. at 408, 409.

In the instant case, it is clear that the Board did not transgress Section 8(d) in finding bad faith. The Board's

¹⁰ Of course, Section 8(d) does require the parties to negotiate with "a desire to reach ultimate agreement, to enter into a collective bargaining agreement." NLRB v. Insurance Agents' International Union, 361 U.S. 477, 485. An employer may not seize upon the "non-concession" language of Section 8(d) as a "cloak . . . to conceal a purposeful strategy to make bargaining futile or fail." NLRB v. Herman Sausage Co., 275 F. 2d 229, 232 (5th Cir. 1960). "Obduracy and obstinacy may be weapons of bargaining, but where they are used not in the interest of bargaining but in its frustration, we cannot give them sanction or refuge. Procrastination and negativity are not components of negotiation . . . The Act requires more than pretense. There is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." Tex Tan Welhausen Co. v. NLRB, - F. 2d -, 72 LRRM 2885, 2887-88 (5th Cir. 1969). An employer is not "immune from condemnation for bad faith because it defines its immediate bargaining tactic as the refusal to agree on one issue." United Steelworkers v. NLRB (Roanoke Iron & Bridge Works), 390 F. 2d 846, 850 (D.C. Cir. 1968).

finding of violation was not premised upon any notion that employers must agree to checkoff clauses, or that the failure to do so is itself evidence of bad faith. Rather, the Board made specific findings, affirmed by the Court of Appeals, that the Company was bargaining with subjective bad faith, i.e., with a desire to frustrate reaching agreement. This Court refused to review those findings, 385 U.S. 851, and it is thus settled that in finding the violation herein the Board did not contravene Section 8(d).

The Company seeks in this case to make Section 8(d) serve an entirely different purpose. It argues that Section 8(d) absolutely forbids any remedy for unfair labor practices which would compel the wrongdoer "to agree to a proposal or . . . mak[e] . . . a concession." The Company admits that the language of Section 8(d) is not addressed to the shaping of remedies (brief, page 18). Nor is there a word in the legislative history, or in any decision of this Court, which suggests that Section 8(d) was intended to restrict the Board's power to remedy violations. Nevertheless, the Company argues that Section 8(d) expresses a "policy of freedom of contract" (brief, page 12); that Section 10(c) authorizes only such remedies "as will effectuate the policies of this Act"; and that, accordingly, the Board may not compel concessions or agreements to remedy violations.

B. In Fashioning Remedies, the Board Must Seek to Effectuate the Policies of "the Entire Act," and the Policies Expressed in Section 8(d) Are Not Entitled to Exclusive Weight.

It is debatable whether Section 8(d) expresses any policy relevant to the fashioning of remedies. Section 8(d) expresses a policy that employers negotiating in good faith are to enjoy "freedom of contract," and are not to have that good faith impugned by reason of their unwillingness to make concessions or agreement. It is a big step, however,

and one which finds no impetus in the legislative history, to conclude that Section 8(d) also expresses a policy of insulating employers negotiating in bad faith from remedies designed to cure their wrongs. Particularly where, as here, the employer's bad faith consisted of an express purpose to frustrate reaching agreement, and was manifested by repeated refusals to bargain, an imposed "concession" seems wholly unrelated to the "policy" which Congress sought to implement by Section 8(d).¹¹

But the Board's power to issue the remedy here should be sustained even if, as the court below held, the policy of "freedom of contract" is a relevant consideration in fashioning remedies.12 Even on that premise, this policy is but one of several policies which must be accommodated in fashioning remedies which effectuate the Act's purposes. The Act also expresses a policy that employers must bargain with "a desire to reach ultimate agreement, to enter into a collective bargaining agreement." NLRB v. Insurance Agents, 361 U.S. 477, 485. "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236. "The declared policy of the Act in §(1) is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest." Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 539. And, most pertinent of all, the Act expresses policies about the need for remedies which will undo the

¹¹ Note, Forced Concession as a Possible NLRB Remedy, 68 Colum. L. Rev. 1192, 1195-1196 (1968); but see Note, Employer's Refusal to Bargain and the NLRB's Remedial Powers: The H. K. Porter Case, 35 Chi. L. Rev. 777 (1968).

¹² The court below stated that the Act "is grounded on the premise of freedom of contract . . . and remedies which infringe on it are not to be casually undertaken." (App. 124).

effects of wrongdoing. "[T]he Board has the power to take appropriate steps to the end that the effect of [unfair labor] practices will be dissipated. . . . It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates." International Association of Machinists v. NLRB, 311 U.S. 72, 82.

If, as we show infra, the Board's order in this case effectuates all of these other statutory purposes, the most that can be said on the Company's side is that there is a "tension" between these policies and Section 8(d)'s policy of freedom of contract. NLRB v. Insurance Agents' International Union, 361 U.S. 477, 486. The Company would resolve that tension by elevating the policy of freedom of contract to an absolute status, to the exclusion of all statutory policies which point in the other direction. That is not, however, the approach which this Court has mandated. On the contrary, this Court has insisted that in fashioning remedies the Board must weigh all of the Act's policies, and strike that balance which best effectuates the Act in its entirety. "Surely [the Board] may so fashion one remedy that it complements, rather than conflicts with, another. It is the business of the Board to give coordinated effect to the policies of the Act." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348. "[T]he advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment . . . [W]e must avoid the rigidities of an either-or rule." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198. This was precisely the approach of the court below: "Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will best effectuate the one at least cost to the other. Though ordering an employer to grant a checkoff obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively" (App. 126-127).

These rulings, requiring the coordination of policies in fashioning remedies, are merely one application of an approach which governs all stages in the administration of this Act. As expressed by Mr. Justice Harlan in *Machinists Local* v. *NLRB*, 362 U.S. 411, 418 n. 7, "it is the entire Act, and not merely one portion of it, which embodies the defini-

tive statement of national policy."

In implementing "the entire Act," this Court frequently has approved remedies which conflict with one of the Act's specific policies. Perhaps the most dramatic examples are those involving orders that an employer bargain with a minority union. No "policy" of the Act is clearer than that an employer may not grant exclusive recognition to a union which represents only a minority of its employees. "Bernhard-Altmann granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgment of § 7 of the Act . . ." Garment Workers v. NLRB, 366 U.S. 731, 737. Yet this Court has repeatedly upheld Board orders requiring an employer to bargain with a minority union as the exclusive representative, where that remedy was found by the Board to be the appropriate method of effectuating the policies of "the entire Act." Frank Bros. Co. v. NLRB, 321 U.S. 702; NLRB v. P. Lorillard Co., 314 U.S. 512; NLRB v. Katz, 369 U.S. 736, 748, n. 16; NLRB v. Gissel Packing Co., 395 U.S. 575.18 In each of these cases, the Court expressly

¹⁸ While Frank Bros., Lorillard and Katz involved unions which had obtained and then lost majority status, the Court made clear in Gissel Packing that in appropriate circumstances the Board may issue a bargaining order even though the union had never achieved majority status. 395 U.S. at 613-614.

rejected the argument that the Board's order exceeded its power because it contravened the policy against bargaining with a minority union. 14

"A fascinating case discussing the "balancing" of policies in fashioning remedies is Garwin Corp., 153 NLRB 664, enforcement denied in relevant part sub nom. Local 57, Int'l Ladies' Garment Workers' Union v. NLRB, 374 F. 2d 295 (D.C. Cir. 1967), cert. denied 387 U.S. 942. The employer violated Section 8(a) (3) by moving his plant from New York to Florida to escape the union which was the certified bargaining agent. To remedy the violation, the Board ordered the employer to bargain with the union for the Florida employees. The employer challenged the remedy as an unlawful imposition of the union upon the Florida work-force, which had never selected it. The Court of Appeals' majority, in an opinion by Judge Burger, sustained the employer's challenge, finding that the Board's order served no policy of the Act. The majority acknowledged, however, that the result might have been different, despite the infringement upon the rights of the Florida employees, if the order had served legitimate policies:

"Such an infringement of the Florida employees' Section 7 rights might be justified if some rights of the New York workers depended on that balancing or if for some other valid reason the Board considered it necessary to promote industrial peace" (374 F. 2d at 301-302).

Judge McGowan, dissenting, thought that the order did serve certain policies of the Act, and that the Board had struck an appropriate balance as between "competing" policies:

"[O]ur task does not end ... when we determine that one policy of the Act has been subordinated in some degree to another Congressional purpose. We must go on to decide whether the particular accommodation of such policies made by the Board in response to the particular circumstances of this case fairly falls within the range of the Board's primary authority to effectuate the purposes of the Act . . ,

". . It is the Board's task to employ its acquired expertise in applying the broad policies of the Act to the various situations which may arise. Translating these policies into practical application, with due regard for accommodating their frequently competing implications, necessarily involves exercising a broad discretion" (374 F. 2d at 307, 308).

It should be evident that the "tension" between policy and remedy is greater in the minority union area than in the instant case. Exclusive recognition of a minority union is unlawful, yet the Board may command it as a remedy. Making an agreement or concession surely is not unlawful—indeed the Act encourages it even if it does not compel it (Sections 1 and 201 of the Act, 29 U.S.C. §§ 151, 171)—and the Board should be entitled to command it, too, where appropriate as a remedy.

There is nothing surprising about the notion that a wrong-doer may be required to remedy his wrong by acts which, but for his wrong, he would not be obligated to perform. The law abounds with examples of such remedies. To cite another instance under the Labor Act: The Act "does not require that the employer permit the use of its facilities for organization when other means are readily available" (NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 114) even though the employer uses his facilities to campaign against the union (United Steelworkers v. NLRB, 357 U.S. 357), yet the Board has held with judicial approval that it can remedy violations by imposing precisely such an obligation upon a wrongdoing employer. 16

¹⁶ Montgomery Ward & Co., Inc., 145 NLRB 846, enforced on this point 339 F. 2d 889 (6th Cir. 1965) (union given right to address employees on company property if employer addresses the employees); H. W. Elson Bottling Co., 155 NLRB 714, enforced on this point 379 F. 2d 223 (6th Cir. 1967) (same): J. P. Stevens & Co., 163 NLRB 217, enforced on this point 388 F. 2d 896 (2d Cir. 1967), cert. denied 393 U.S. 836 (union given access to company bulletin boards for a one year period); J. P. Stevens & Co., 167 NLRB Nos. 37 and 38, 66 LRRM 1024 and 1030, enforced on this point 406 F. 2d 1017 (4th Cir. 1968) (same): J. P. Stevens & Co., 171 NLRB No. 163, 69 LRRM 1088, enforced — F. 2d —, 72 LRRM 2433 (5th Cir. 1969) (same); Scott's, Inc., 159 NLRB 1795, enforced 383 F. 2d 230, n. 4 (D.C. Cir. 1967) (union given right to address employees on company property).

C. The Board, with Judicial Approval, Frequently Has
Fashioned Remedies Which Exact Concessions or Impose Agreement

Indeed, closer to home, the Board frequently has fashioned remedies which interfere with the policy of "freedom of contract," and this Court and the courts of appeals have approved such remedies. Thus the instant case is not the innovation that the Company tries to make it. In order to correct this misconception, we discuss the prior cases at some length.

(1) Remedying Refusals to Sign

Section 8(d) expressly requires "the execution of a written contract incorporating any agreement reached if requested by either party." Refusal to comply is, of course, a violation of Section 8(a)(5). NLRB v. Strong, 393 U.S. 357, 359; H. J. Heinz Co. v. NLRB, 311 U.S. 514, 523-526.

Recently the Board and the courts have confronted a remedial dilemma: it is not sufficient merely to order an employer to sign an agreement at the end of prolonged litigation, when by that time the agreed-upon period of such an agreement has expired. In NLRB v. Warrensburg Board & Paper Corp., 340 F. 2d 920 (2d Cir. 1965), the court fashioned a remedy which solved the dilemma. The parties had agreed upon a contract to run for two years, i.e., until March 1, 1964, but the employer thereafter refused to sign the agreement. The Board, on June 28, 1963, found a violation of Section 8(a)(5), but its finding was not affirmed by the Second Circuit until January 5, 1965 (after the agreement would have expired by its terms). Because an order at that late date to sign the agreement with its original termination date obviously would have been meaningless, the court majority ordered the employer to sign an agreement which would expire at a later date:

"The contract embodying the agreement between

the Union and Respondent was scheduled to terminate on March 1, 1964. As this date has long since passed, we modify the order of the Board to provide that the contract shall have a new effective terminal date of September 1, 1965" (340 F. 2d at 925).

Manifestly the court was rewriting the termination provision of the parties' contract, and imposing upon the employer an agreement for a period to which it had never assented. Nevertheless, the court deemed this necessary lest the absence of such a remedy "encourage purposeful delay in other cases" 340 F. 2d at 923. Judge Moore dissented because "the 'new effective terminal date to be September 1, 1965' as specified by the majority creates by judicial fiat a three-year contract instead of the two-year contract ... agreed upon by the parties." 340 F. 2d at 926, n. 1,

The Second Circuit's lead was followed by the Board itself, Schill Steel Products, Inc., 161 NLRB 939, and was approved and followed in a unanimous decision of the Fourth Circuit in NLRB v. Beverage-Air Company, 402 F. 2d 411, 417, n. 5 (4th Cir. 1968). The Fourth Circuit noted that failure to adopt this course "would enable an employer to benefit from his own unfair labor practice." Ibid. 16

(2) Remedying Untimely Withdrawals from Multi-Employer Units

It is well settled that multi-employer bargaining is "wholly voluntary", and that an employer who has participated in such bargaining in the past "is free to withdraw from it." Universal Insulation Corp. v. NLRB, 361 F. 2d 406 (6th Cir. 1966); NLRB v. Sheridan Creations, Inc., 357 F. 2d 245 (2d Cir. 1966); NLRB v. Sklar, 316 F. 2d 145 (6th Cir. 1963). But such withdrawal must be "timely." The Board has held, with judicial approval, that

¹⁶ Cf. NLRB v. George E. Lightboat Storage Inc., 373 F. 2d 762, 770 (5th Cir. 1967).

withdrawal is untimely, and violative of Section 8(a)(5), "once negotiations on a new contract have started." Universal Insulation, supra, 361 F. 2d at page 408; Sheridan Greations, supra, 357 F. 2d at page 347.

The effect of this rule is that an employer who withdraws from a multi-employer unit after negotiations have started, but before a contract has been consummated, will nevertheless be ordered to sign any contract which eventuates from the multi-employer negotiations. That is precisely what was ordered of the employers who withdrew "untimely", albeit prior to the consummation of a multi-employer contract, in a host of decided cases.¹⁷

In none of these cases had the employer consented to the agreement imposed upon him; indeed, he had withdrawn authority from the multi-employer negotiators before any agreement was reached. Nevertheless, it was deemed appropriate to remedy his violation—untimely withdrawal—by visiting an entire contract upon him.

(3) Remedying Unilateral Changes

It is well established that an employer violates Section 8(a) (5) by changing terms and conditions of employment "unilaterally," i.e., without first bargaining with the union thereon. NLRB v. Katz, 369 U.S. 736; Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203. The remedy which the Board has fashioned in such cases is to "restore the status quo ante" by requiring the employer to pay during the period following the change the same benefits which had

¹⁷ Walker Electric Co., 142 NLRB 1213, 1220-1221, 1225; Cosmopolitan Studios, Inc., 127 NLRB 788, enforcement denied for other reasons 291 F. 2d 110 (2d Cir. 1961); Sheridan Creations, Inc., 148 NLRB 1503, enforced 357 F. 2d 245 (2d Cir. 1966), cert. denied 385 U.S. 1005; Tulsa Sheet & Metal Works, 149 NLRB 1487, enforced 367 F. 2d 55 (10th Cir. 1966); John J. Corbett Press, Inc., 163 NLRB 154, enforced 401 F. 2d 673 (2d Cir. 1968); Mor Paskesz, 171 NLRB No. 20, 68 LRRM 1145, enforced 405 F. 2d 1201 (2d Cir. 1969).

been provided prior to the change. In Fibreboard Paper Products Corp., 138 NLRB 550, 554-555, enforced 322 F. 2d 411 (D. C. Cir. 1963), affirmed 379 U.S. 203, 215-217, the employer had unilaterally contracted out work formerly done by its own employees, and it was ordered to resume performing that work with its own employees and to compensate its employees for work opportunities lost as a result of the contracting out. At least four Courts of Appeals have approved similar remedies.¹⁸

In each of these cases the employer contended that it had not agreed to pay the benefits ultimately ordered, that had it bargained it might have succeeded in accomplishing the change it wanted anyway, and that, accordingly, to require it to make the payments constituted the imposition of an obligation against its will and the exaction of a concession to which it might not have consented in negotiations. For example, the employer's brief to this Court in Fibreboard complained that the Board's order:

". . . assumes that bargaining would have resulted in abandonment by Petitioner of its plan to contract out work. The Board might with equal justification

¹⁸ In Central Illinois Public Service Co., 139 NLRB 1407, enforced 324 F. 2d 916 (7th Cir. 1963), the employer unilaterally discontinued a gas discount which it had accorded to its employees, and it was ordered to reimburse employees in the amount of the discount for the period subsequent to its discontinuance. In United Nuclear Corp., 156 NLRB 961, enforced 381 F. 2d 982 (10th Cir. 1967), the employer unilaterally discontinued its severance pay policy, and it was ordered to pay severance pay to those employees who became eligible therefore during the period subsequent to discontinuance. In Overnite Transportation Co., 157 NLRB 1153, enforced 372 F. 2d 765 (4th Cir. 1967), cert. denied 389 U.S. 838, the employer unilaterally reduced wages, and it was ordered to pay the employees the additional amounts which they would have earned but for the reduction. In Frontier Homes Corp., 153 NLRB 1070, enforced on this point 371 F. 2d 974 (8th Cir. 1967), the employer unilaterally altered its seniority practices, and it was ordered to compensate those employees who were laid off contrary to the prior seniority practices.

have assumed that bargaining would have resulted in acceptance by Petitioner of the Union's wage and other demands. There was no . . . warrant for the Board's assumption that bargaining would have resulted in abandonment of the plan to contract out the work . . .

* * *

"As for the Board's assertion that its order imposed no 'undue or unfair burden' on Petitioner, the fact is that it required Petitioner, after the lapse of three years and laboring under . . . recruitment difficulties . . ., to rebuild a supervisory and working force with which to resume, with no prospect of reduced costs, the performance of an operation which had been abandoned as too costly.

"... The only wrong (if it was a wrong) of which Petitioner was convicted was a refusal to bargain about whether it should let the maintenance work to an independent contractor. All that was necessary to undo that wrong was an orthodox order that Petitioner bargain. The requirement that bargaining be preceded by a resumption of operations which had been abandoned as too costly and by reinstatement with back pay of employees who had been terminated because their services were no longer needed is, we submit, punitive." 19

The employer (Fibreboard) accurately claimed that the Board's order visited upon it that which the union might not have obtained in bargaining. Surely, this was an intrusion upon the employer's "freedom of contract," and exacted from it a concession which it might not have made had it bargained in good faith. Nevertheless, this Court upheld the Board's order as "well designed to promote the policies of the Act." 379 U.S. at 216.

¹⁹ Petitioner's Brief, pp. 44-46, in Fibreboard Paper Products Corp. v. NLRB, October Term, 1964, No. 14.

(4) Depriving the Wrongdoer of the Fruits of Illegal Conduct

The Board, with judicial approval, has consistently nullified contracts, or contractual provisions, which though lawful on their face were obtained through the commission of unfair labor practices. Each of these cases exacted a "concession" from the employer: he was required to surrender benefits which he had achieved in negotiations. This result is hardly surprising, of course. But it proves our thesis: that while the Board may not interfere with the freedom of contract of an employer negotiating in good faith, it can fashion remedies which interfere with the freedom of contract of an employer who negotiates in bad faith or who otherwise violates the Act.

In National Licorice Co. v. NLRB, 309 U.S. 350, the Board found that an employer violated Section 8(5) (the predecessor of Section 8(a)(5)) by ignoring the union and negotiating individual contracts with the employees in which they waived the right to a union-negotiated agreement. The Board ordered the employer to release the employees from all their obligations under the contracts, and this Court enforced the order:

"Since the contracts were the fruits of unfair labor practices... and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by §10 of the Act... Hence the Board was free by its order to direct that the [employer] should take no benefits from the contracts..." 309 U.S. at 361.

In Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, the employer checked off dues pursuant to a collective bargaining agreement negotiated with its union and written authorizations supplied by its employees. The Board, finding that the union was employer-dominated, ordered not only dissolution of the union but also that the employer reimburse the employees in the amount of dues which had

been checked off, and this Court affirmed. In a certain sense, Virginia Electric and this case are twins. In Virginia Electric the Board remedied a violation by exacting the employer's surrender of a negotiated checkoff; here, the Board remedied a violation by requiring the employer's adoption of a checkoff. In each case, "freedom of contract" was sacrificed to the overriding need to remedy unfair labor practices.²⁰

In NLRB v. Borg-Warner Corp., supra, 356 U.S. 342, the employer insisted that the collective bargaining agreement contain two provisions which ultimately were held to be non-mandatory bargaining subjects.21 The union negotiators vigorously opposed both of these demands, but the "company's representative made it equally clear that no agreement would be entered into by it unless the agreement contained both clauses." (Id. at 347). In view of this impasse, the union struck, but, confronted with the reality that the strike was not succeeding, it ultimately gave in and entered into a collective bargaining agreement containing both controversial clauses. (Ibid). Prior to the signing, however, the union had filed unfair labor practice charges with the Board, alleging that the employer's insistence upon these clauses constituted a violation of Section 8(a)(5). The Board so held, and ordered the employer to cease and desist from insisting upon the clauses. (113 NLRB 1289,

³⁰ For more recent cases in which the Board remedied unfair labor practices by exacting the surrender of collectively bargained contracts or contract clauses, see *Ice Cream, Frozen Custard Employees*, 145 NLRB 865, 871-872; *Local 80, Sheet Metal Workers*, 161 NLRB 229, 237-238; *The Kroger Co.*, 164 NLRB No. 54, 65 LRRM 1089, 1090-1091, enforced on this point 401 F. 2d 682, 687 (6th Cir. 1968).

²¹ (1) A "recognition clause" which excluded, as a party to the contract, the International Union which had been certified by the NLRB as the employees' exclusive bargaining agent and substituted instead the uncertified local affiliate; and (2) a "ballot" clause requiring a secret vote of all employees—union and non-union—on the employer's last contract offer as a precondition to a strike (356 U.S. at 343-344).

1297). This Court, although expressly stating that the clauses sought by the employer were lawful (356 U.S. at 349),²² nevertheless affirmed the Board's decision and its order.

The employer thus was required to surrender the provisions which it had won from the union in the negotiations. Plainly, this was a "concession" exacted from the employer against his will. While the concession in Borg-Warner took the form of requiring the employer to delete clauses from a contract, whereas, in the instant case, the concession took the form of requiring the employer to insert a clause in the contract, the two remedies equally trench upon the employer's "freedom of contract." Surely, to require deletion of contract clauses previously obtained through negotiation is no less an infringement of freedom of contract than requiring the inclusion of a contract clause.

We have shown that, in a variety of circumstances, the Board and the courts have remedied refusals to bargain by exacting a concession from the employer or by imposing upon the employer an "agreement" to which he had not agreed. To be sure, none of these precedents is precisely the same as the instant case. The nature of the violation has differed, and the particular form of concession exacted or agreement imposed has differed. These differences, however, do not refute our central point: that Section 8(d) does not deprive the Board of power, in appropriate circumstances, to remedy refusals to bargain by exacting concessions or imposing agreements. That power exists, and in the above cases was found to have been exercised appropriately.

^{**}Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement" (356 U.S. at 349).

D. This Court, Fashioning Federal Law under Section 301, Has Subordinated "Freedom of Contract" to Other Policies of the Act Where on Balance That Course Was Deemed Appropriate.

Section 301 of the Act, 29 U.S.C. §185, was enacted simultaneously with Section 8(d). This Court has held that "the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Textile Workers v. Lincoln Mills, 353 U.S. 448, 456. Thus, the policy of "freedom of contract" which the Board must respect is equally relevant to the exercise of judicial power under Section 301, and the role which this Court has accorded "freedom of contract" in implementing Section 301 provides a useful insight into the scope of the Board's power under Section 10(c).

This Court has not deemed itself wholly forbidden from exercising its authority under Section 301 to impose contractual obligations upon an employer who has not agreed thereto. In John Wiley & Sons v. Livingston, 376 U.S. 543, this Court had to decide "whether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer" (Id. at 544). The Court held "that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." (Id. at 548).

In reaching this conclusion, this Court undertook the same process of "balancing policies" which the court below held the Board was entitled to do in the instant case, and refused to accord exclusive weight to "freedom of contract" (Id. at 550):

"Central to the peculiar status and functions of a collective bargaining agreement is the fact, dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate, as we have said, . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed."

In Wackenhut Corp. v. International Union, United Plant Guard Workers, 332 F. 2d 954 (9th Cir. 1964), this Court's decision in Wiley was held to require an armslength purchaser of a business to arbitrate grievances under the seller's collective bargaining agreement. The court explained the result entirely in terms of the balancing of policies (Id. at 958):

"What the Supreme Court did in Wiley was to balance the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers against the necessity of affording some protection to the employees covered by a collective bargaining agreement containing an arbitration clause, from a sudden change in the employment relationship. Having in view the objectives of national labor policy reflected in established principles of federal law, the court held the described interest of the employees outweighs that of the employer, and must prevail."

All that we contend in the instant case is that the Board—authorized to fashion remedies which effectuate the policies of "the entire Act"—can and should undertake the same balancing of competing policies as this Court has deemed warranted in implementing Section 301. Of course,

it is still necessary to examine whether the particular balance which the Board has struck in the instant case is an appropriate one, and it is to this that we now turn.

II. THE BOARD'S EXERCISE OF ITS POWER WAS APPROPRIATE IN THIS CASE, AND DOES NOT PORTEND "CONTRACT-WRITING" AS A REM-EDY GENERALLY

We have shown that Section 8(d) does not deprive the Board of power to exact concessions as a remedy. The only remaining question is whether the exercise of that power in this case was appropriate. That is, of course, a very different question, one which the Company does not appear anxious to litigate.²³

Nevertheless, we feel obliged to discuss this question, and to suggest the dimensions of the Board's right to use this remedy, in order to counter a bit of hyperbole indulged in both by the Company and by the Chamber of Commerce, amicus curiae. The Chamber warns that if the Board's power is affirmed in this case—which the Chamber admits "obviously warrants the invocation of a strong and effective remedy" (Chamber's brief, page 3)—that power "will no doubt be utilized by the Board to justify even further and more serious intrusions" on freedom of contract (Ibid). "[T]he

²³ In its principal decision, the court below determined that the Board had the power, and remanded to allow the Board to decide whether the exercise of that power was warranted by the facts of this case: (App. 121). On remand, the Board concluded that the remedy "is warranted in the circumstances of this case" (App. 135). The Company thereupon petitioned for review, arguing only that Section 8(d) precludes any remedy which compels agreement. The Company made no contention that, if the Board had the power in some situations, this was an inappropriate case for its exercise. Likewise, in this Court, the only "Question Presented" by the Company is the broad one, unrelated to the circumstances here, of whether the Board, "has the power to order a party to agree to a substantive provision of a collective bargaining agreement" (Brief for Petitioner, page 3). Thus the Company has made a conscious choice not to contend that the power, if it exists, was exercised inappropriately.

Board may also penalize other employers and unions for other violations of law by requiring that they agree to other substantive contractual provisions" (Id., page 2). The Company similarly warns that "if the Board can order the Company to agree to this contract clause, there is nothing to prevent it from ordering either an employer or a union to agree to contract provisions concerning wage rates, fringe benefits and other terms and conditions" (Brief for Petitioner, page 11).

These fears, of course, are wholly unwarranted. We first show why in this case the remedy is entirely appropriate. We then show that there are protections built into Section 10(c) which assure that affirmance here will not inject the Board into the contract-writing business on a broad scale.

A. In the Circumstances Here, the Board's Remedy Was Appropriate to "Effectuate the Policies of the Act"

The keys to the remedy in this case are the underlying findings of violation. The Board found that the Company's reason for refusing the checkoff was "to forestall reaching an agreement with the Union" (App. 50, 135). Furthermore, the Board found not only that this was the Company's reason, but that by its own admission the Company had no other reason for refusing to checkoff dues (App. 135; see also App. 30, 32, 36-37). The Board thus was confronted with an employer who (a) was a recidivist, having twice refused to bargain during its first negotiations with the Union; (b) had admitted it had no reason for refusing the Union's request except a reason found unlawful; and (c) who, nevertheless, in response to the Board's second order to bargain, continued to refuse the request, playing "fast and

²⁴ As Mr. Chief Justice (then Judge) Burger remarked, dissenting in another case, this was the "crucial finding" which justified the Board's conclusion in the instant case that the Company had refused to bargain. *United Steelworkers* v. NLRB (Roanoke Iron & Bridge Works), 390 F. 2d 846, 854 (D.C. Cir. 1968).

loose" with the courts28 but tendering no lawful reason for its refusal.

In these circumstances, ordering the Company to grant the checkoff was essential to effectuate the policies of the Act. Failure to do so would have made a mockery of the Act. Employers would learn that their statutory obligation to bargain with "a desire to reach ultimate agreement" secould be evaded by the simple expedient of remaining mum in the face of a bargaining order, or invoking the talismanic cry that the Board had not, and could not, require the mak

ing of a concession.

Unlike the Company, which seems proud of its discovery of a means to render the Act a nullity, the Chamber of Commerce recognizes the force of the Board's reasoning, and acknowledges that these facts "obviously warrant the invocation of a strong and effective remedy" (Chamber's brief, page 3). In the Chamber's view, that remedy should be invocation of the contempt power, which "has long been recognized as the appropriate vehicle for punishing contemptuous conduct and compelling the contemnor 'to do what the law requires of him." (Id., page 9). The trouble with this approach is that it begs the question. This Company has painted itself into such a corner that the only way it could purge itself of contempt is by granting a checkoff. On the special facts of this case, that is "what the law requires of it." If the Company must grant the checkoff to purge itself of contempt, the Board can and should order that act directly. "It is obvious that the order of the Board, which, when judicially confirmed, the courts may be called upon to enforce by contempt proceedings, must, like the

26 NLRB v. Insurance Agents' International Union, 361 U.S. 477,

485.

²⁸ As noted in our counterstatement of the case, supra, p. 7, the Company told both the court below and this Court that it understood the Court's decree to require that it agree to the checkoff, but when these pleas failed to win review from this Court the Company adopted the opposite interpretation in its dealings with the Union.

injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing." NLRB v. Express Publishing Co., 312 U.S. 426, 433. "Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings." J. I. Case Co. v. NLRB, 321 U.S. 332, 341. Surely the Board does not lack power to order specifically those acts which, if left undone, will subject the respondent to punishment for contempt.

B. Protections Built into Section 10(c) Assure That The Board Cannot Abuse Its Power

We have shown that the Board's order was appropriate to remedy the violation found in this case. It does not follow that, as the Company and the Chamber of Commerce fear, affirmance here will entitle or embolden the Board to make a general practice of exacting concessions to remedy refusals to bargain.

The assurance that the Board will not do so is implicit in Section 10(c) of the Act. The Board is empowered to fashion remedies which "will effectuate the policies of the Act" and that mandate is, indeed, a broad one. It

²⁷ As recently expressed in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216, Section 10(c) "'charges the Board with the task of devising remedies to effectuate the policies of the Act.' Labor Board v. Seven-Up Bottling Co., 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. Ibid. '[T]he relation of remedy to policy is pecularily a matter for administrative competence . . .' Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 194. 'In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience.' Labor Board v. Seven-Up Bottling Co., 344 U.S. 344, 346. The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' Virginia Elee. & Power Co. v. Labor Board; 319 U.S. 533, 540." See also NLRB v. J. H. Rutter-Rex Mfg. Co., 38 U.S.L. Week 4067, 4068 (Dec. 15, 1969); NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 610-616; NLRB v. Strong, 393 U.S. 357, 359; J. P. Stevens Co. v. NLRB — F. 2d —, 72 LRRM 2433 (5th Cir. 1969).

does not, however, give the Board unfettered license. "[T]his authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices . . . The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-236. The Board's exercise of discretion in fashioning remedies is "subject... to the limitation that its action may not be 'arbitrary, unreasonable or capricious.'" NLRB v. Fansteel Corp., 306 U.S. 240, 258.

These limitations effectively assure that, in remedying run-of-the-mill refusals to bargain, the Board cannot dictate the terms of the collective bargaining agreement. For example, the employer who violates Section 8(a)(5) by refusing to meet with the union, or by delaying negotiations, or by refusing to provide information to which the union is entitled, has not thereby demonstrated that he lacks legitimate reasons for resisting the union's demands. In such cases, it might be "punitive," or "aribtrary, unreasonable or capricious," to order the employer to agree to the union's demands. Such a remedy might not be necessary to cure the prior violation, and it would have the unwarranted

²⁸ This is not to say, however, that the Board is without power to order compensation to employees for the period during which the employer has refused to bargain. See e.g., the "unilateral change" cases discussed supra, and the analysis in Part IV, infra.

²⁹ Again, as we discuss in Part IV, it may be appropriate to compensate the employees for the period during which they were unlawfully denied their statutory bargaining rights. Our point is that it would not be appropriate to decree a contract for the future without allowing the employer to protect his legitimate interests by good faith negotiations.

effect of denying the employer an opportunity to protect his legitimate interests by good faith negotiations.

What distinguishes this case is the Company's acknowledgment on the record that it does not have any legitimate objection to the Union's request. In this case the remedy is necessary to cure the violation, and there is no danger that the remedy might foreclose the advancement by the Company of legitimate reasons for resisting the Union's demands.

Indeed, while we do not believe the Court need mark the outer limits of the Board's power in order to decide this case, there is a line which readily commends itself. This court has recognized in other contexts that the existence of "legitimate and substantial business justifications" is an appropriate touchstone for upholding employer action. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378; NLRB v. Great Dane Trailers, 388 U.S. 26, 34; NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-229, 235-236. "It is the primary responsibility of the Board . . . 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." Fleetwood Trailer, 389 U.S. at 378. This Court has noted in such contexts the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." NLRB v. Erie Resistor, 373 U.S. at 229.

These considerations seem equally appropriate to the question of when the Board may remedy refusals to bargain by exacting concessions or imposing agreement. It may not be appropriate for the Board to fashion remedies which foreclose even wrongdoing employers from resisting union demands which they contend in good faith jeopardize "legitimate and substantial" business considerations. On

the other hand, where it is clear that no such considerations are present, a remedy which otherwise effectuates the policies of the Act can hardly be "punitive" or "arbitrary, unreasonable or capricious."

Here, of course, the Company did not have even insubstantial business justifications for its resistance to the Union's request—it had no reason whatsoever except an unlawful desire to forestall agreement. Thus there can be no doubt that this case falls on the side of the line permitting the Board's order.

III. IN ANY EVENT, THE BOARD'S ORDER IN THIS CASE DID NOT EXACT A "CONCESSION."

Thus far, we have assumed (as the Company contends and the court below assumed) that the Board's order exacted a "concession" from the Company. We have shown that, in the circumstances of this case, the Board appropriately could exact such a "concession."

It is not at all self-evident, however, that what was required of the Company here amounted to a "concession" within the meaning of Section 8(d). To be sure, the Company was compelled to relinquish its illegal reason for refusing the Union's request, i.e., its desire to forestall agreement. But no one, not even the Company, contends that Section 8(d) vouchsafes the right to adhere to illegal positions. And once that reason is denied the Company, it remains by its own admission with no other reason for refusing the request. Does an employer make a "concession" when it agrees to a union demand to which it has no objection?

Neither the legislative history nor the decisions construing Section 8(d) shed light on what constitutes a "concession." But we do know that Section 8(d) requires bargaining with "a desire to reach ultimate agreement, to enter into a collective bargaining agreement." N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477, 485. It would frustrate that statutory objective, we submit, to treat

as a "concession" an employer's acquiescence in that to which it has no objection. Congress was concerned that employers not be required to "yield . . positions fairly maintained." N.L.R.B. v. Herman Sausage Co., 275 F. 2d 229, 231 (5th Cir. 1960). Lacking a lawful objection to a union's request, an employer has no position to "yield."

An employer would be making a "concession" if forced to yield to a union request which he had resisted because it would increase his costs, impair the efficiency of his operations, reduce his profits, injure his competitive standing, or otherwise conflict with his legitimate business interests. Cf. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378; NLRB v. Great Dane Trailers, 388 U.S. 26, 34; NLRB v. Erie Resistor Corp., 373 U.S. 221, '228-229 and see our discussion supra, pp. 40-41. But for the employer who lacks any such concern, there is no "concession" to be made.

IV. THE ISSUES IN THIS CASE ARE DIFFERENT FROM THE ISSUES IN THE EX-CELL-O CASES PENDING BEFORE THE BOARD

The Chamber of Commerce (brief pp. 12-13) asserts that the outcome of severall important cases now pending before the Board, commonly known as the Ex-Cell-O cases, 30 will be determined by the Court's decision in the instant case. That assertion is unfounded: the Ex-Cell-O cases pose a different legal issue than that presented here.

In the Ex-Cell-O cases, the charging parties have asked the Board to fashion a remedy which will compensate employees for their loss of the right to bargain during the period in which their employer refused to bargain with their union. The Board is mot being asked to dictate terms of employment for the future, but only to compensate the employees for an injury visited upon them in the past.

³⁰ See Ex-Cello-O Corporation (Case No. 25-CA-2777; Zinke's Foods, Inc., Case No. 30-CA-372; Hermian Wilson Lumber Co., Case No. 26-CA-2536; Rasco Olympia, Inc., Case No. 19-CA-3187.

The most that can be said of the similarity between the Ex-Cell-O cases and this case is that in each the charging party urged the Board to exercise its discretionary remedial power in an affirmative and more meaningful way in the quest to effectuate the policies of the Act. Indeed, we would hazard a guess that if this Court upholds the Board's order in the instant case, the Chamber will not hesitate to urge that H. K. Porter is not binding precedent in Ex-Cell-O precisely because of the distinctions we have noted above.

CONCLUSION

For the reasons stated, the judgment of the Court below should be affirmed.

Respectfully submitted,

ELLIOT BREDHOFF

MICHAEL H. GOTTESMAN

GEORGE H. COHEN

1001 Connecticut Avenue, N. W.

Washington, D. C. 20036

Attorneys for United Steelworkers
of America

Bernard Kleiman 10 South LaSalle Street Chicago, Illinois 60603 Of Counsel

INDEX

14

Aland, 400 F. 24 1017 half Land Give of Workest Lanna.

bana (mol) -- man 1

Specific 15 on 8th period and all on the probability	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
A. The earlier proceedings	2
B. The present proceeding	6
Argument	8
Summary and introduction	8
I. In the circumstances of this case, the Board did not	
exceed its authority, under Section 10(c) of the	
Act, by ordering the company to grant the Union	
a checkoff provision in the contract	13
A. The Board's supplemental order is an	
appropriate remedy for the Company's	
unfair labor practice	13
B. The Board's supplemental order does not	
contravene Section 8(d) of the Act	23
Conclusion.	29
Appendix	31
the state of the s	
CITATIONS	
Cases:	
Electrical Workers v. National Labor Relations Board,	
328 F. 2d 723	16
Fibreboard Paper Products Corp. v. National Labor	
Relations Board, 379 U.S. 203 10, 13, 1	19, 20
Franks Brothers Co. v. National Labor Relations	
Board, 321 U.S. 702	14
General Asbestos & Rubber Division, Raybestos-Man-	
hattan, 168 No. 54, 67 LRRM 1012	15
H. J. Heinz Co. v. National Labor Relations Board,	
811 U.S. 514	19
J. P. Stevens & Co. v. National Labor Relations	
Board, 72 LRRM 2433	22, 23

8	ses—Continued	
	J. P. Stevens & Co. v. National Labor Relations	Page
	Board, 406 F. 2d 1017	22
	Int'l Ladies' Garment Workers' Union v. National Labor	-
	Relations Board, 366 U.S. 731	14
	Int'l Union of Electrical Workers v. National Labor Relations Board (Scott's, Inc.), 383 F. 2d 230, cer-	
		-
	tiorari denied, 390 U.S. 904 Local 80, Sheet Metal Workers (Turner-Brooks, Inc.),	21
	161 NLRB 229	28
	McLane Co., 166 NLRB No. 127, 65 LRRM 1729	15
	Montgomery Ward & Co. v. National Labor Relations	
	Board, 339 F. 2d 889	22
	National Labor Relations Board v. American Aggregate Co., 335 F. 2d 253	27
	National Labor Relations Board v. American National	
	Insurance Co., 343 U.S. 395	24 00
	National Labor Relations Board v. Beverage-Air Co.,	24, 20
	402 F. 2d 411, enforcing 164 NLRB 1127	90
	National Labor Relations Board v. Borg-Warner Corp.,	28
	356 U.S. 342	25
	National Labor Relations Board v. Elson Bottling Co.,	
	379 F. 2d 223	22
	National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575	14, 23
	National Labor Relations Board v. Insurance Agents' Int'l Union, 361 U.S. 477	24, 27
	National Labor Relations Board v. J. H. Rutter-Rex	
	Mfg. Co., No. 32, this Term, decided December 15,	
	1969	13
	National Labor Relations Board v. Katz, 369 U.S. 736	19
	National Labor Relations Board v. Lewin-Mathes Co.,	27
	National Labor Relations Board v. Newport News	
	Shipbuilding & Dry Dock Co., 308 U.S. 241	
	National Labor Relations Board v. Reed & Prince Mfg.	
	Co., 205 F. 2d 131, certiorari denied, 346 U.S. 887.	24
	National Labor Relations Board v. Seven-Up Bottling	
	Co., 344 U.S. 346	19
	National Labor Relations Board v. Strong, 393 U.S.	
	257	13

Cases-Continued	
National Labor Relations Board v. United Clay Mines	Page
Corn. 219 F. 2d 120	28
National Labor Relations Board v. Walton Mfg. Co.,	
280 F. 2d 177	6
National Labor Relations Board v. Warrensburg Board	
A Paper Corp., 340 F. 2d 920	28
National Licorice Co. v. National Labor Relations	
Roard 309 U.S. 350	13
Phelps Dodge Corp. v. National Labor Relations Board,	
919 II S 177	14, 19
Republic Aviation Corp. v. National Labor Relations	
Roard, 324 U.S. 793	6
Retail Clerks International Ass'n. v. National Labor	
Relations Board, 373 F. 2d 655	28
Textile Workers v. National Labor Relations Board	
(J. P. Stevens & Co.), 388 F. 2d 896	22
United Steelworkers v. National Labor Relations Board	
(Roanoke Iron & Bridge Works, Inc.), 390 F. 2d	
846, certiorari denied, 391 U.S. 904	15, 16
Virginia Electric & Power Co. v. National Labor Re-	
lations Board, 319 U.S. 533.	14
Statutes:	
National Labor Relations Act, as amended (61 Stat.	
136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.)	2, 29
Section 7	15, 31
Section 8(a)	31
Section 8(a)(1)	5
Section 8(a)(5)	
Section 8(b)(3)	27
Section 8(d) 12, 13, 24, 25, 26,	28, 32
Section 10(c) 8, 13, 24,	28, 32
Miscellaneous:	
Cox, The Duty To Bargain in Good Faith, 71 Harv. L.	
Rev. 1401	24
Note, Forced Concession as a Possible NLRB Remedy,	
68 Colum. L. Rev. 1192 (1968)	25
Note, The Need for Creative Orders Under Section 10(c)	
of the National Labor Relations Act, 112 U. Pa. L.	
Rev. 69 (1963)	18

Vincent Land Vinter Committee Commit The state of the s

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC., DISSTON DIVISION— DANVILLE WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES DOURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The order of the court of appeals enforcing the Board's supplemental order is set forth at A. 140–141. The earlier opinions of the court of appeals are reported at 363 F. 2d 272, certiorari denied, 385 U.S. 851, and 389 F. 2d 295 (A. 55–78, 114–130). The Board's decisions and orders are reported at 172 NLRB No. 72, and 153 NLRB 1370 (A. 43–56, 132–137).

JURISDICTION

The judgment of the court of appeals (A. 140-141) was entered on April 22, 1969. The petition for a writ of certiorari was filed on June 13, 1969, and was granted on October 13, 1969 (A. 142). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board, upon finding that the employer's refusal to agree to the union's request for a contract provision for the check-off of union dues was not in good faith but solely to frustrate an agreement with the union, has power, as a remedy for that unfair labor practice, to order the employer to grant such a provision.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), are set forth in the Appendix, infra, pp. 31-33.

STATEMENT

A. THE EARLIER PROCEEDINGS

In October 1961, the Union,' after winning a Board election, was certified as the representative of the production and maintenance employees at the Company's Danville, Virginia, plant (A. 44-45, 58, 116; 41, 15). Contract negotiations began shortly after the Union's certification and extended over the next five

¹ The United Steelworkers of America, AFL-CIO.

years, giving rise to two unfair labor practice cases against the Company (A. 58, 116-119; 17-19, 20-22, 41-

42, 85).

In the first set of negotiations, which terminated in November 1962, the parties met 28 times without reaching an agreement (A. 45, 116; 17–18). Upon charges filed by the Union, the Board found that the Company had failed to bargain in good faith by, interalia, refusing to agree to any provision for arbitration while insisting upon a no-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times (A. 45–46, 60, 116). The Board ordered the Company to cease its illegal conduct and to bargain in good faith. On July 17, 1964, the Court of Appeals for the Fourth Circuit summarily enforced the Board's order (A. 46, 116).

Meanwhile, in October 1963, following the Trial Examiner's decision in the first case, the parties resumed contract negotiations (A. 46; 17-19, 41-42). Over the next 11 months, 21 more meetings were held without arriving at a contract (A. 46, 116; 18-19, 42). It was not until the next-to-last meeting on August 25, 1964, that the Company finally withdrew its no-strike demand, and the Union, which had made concessions on a number of other issues, acceded to the Company's insistence that there be no arbitration provision in the contract (A. 60, 116-117; 20, 24). When this second round of negotiations broke off on September 10, 1964, three issues were still unresolved: wages, health insurance, and the Union's request for a deduction by the employer of union dues from the paychecks of

employees who authorized such a deduction ("check-off") (A. 46-47, 60-61, 116-117; 19).

There were about 302 employees in the bargaining unit, and they lived within a radius of 35 to 40 miles from the plant. The Union had no clerical staff in Danville; its closest office was in Roanoke, about 85 miles away. Accordingly, a checkoff was the only feasible means by which the Union could obtain prompt and regular collection of monthly dues. (A. 22-24.)

Dues checkoff had been discussed at virtually every bargaining session, and each time the Company rejected the Union's request for such a contract clause (A. 47; 21, 29). The Company concededly did not reject the checkoff because it was inconvenient or for any other business reason; it regularly made payroll deductions for savings bonds, insurance, the United Givers Fund, and a "Good Neighbor" fund at the Danville plant, and it had agreed to checkoff dues for other unions at its other plants (A. 47-48, 62-63; 26-30, 33, 35). The Company's chief negotiator admitted that he refused to agree to a checkoff, or to any proposal that would permit the Union to collect dues in nonworking areas of the plant, solely on the ground that the Company was "not going to aid and comfort the union" at this location in the conduct of "union business" (A. 47, 63; 32, 30, 21). Similarly, Company counsel acknowledged that "perhaps our refusal to grant the check-off clause has been harassment of the International Union * * *" (A. 16); "our purpose was that we were not going to aid and comfort the International Union at this location" (A. 36).

The Union again charged the Company with refusing to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act (A. 6-8, 41). On the basis of the above facts, the Board sustained the charge, adopting the Trial Examiner's finding that the Company's rejection of the checkoff was motivated by a desire to frustrate agreement with the Union (A. 49-51, 55-56). The Board again ordered the Company to cease and desist from the unfair labor practice found, and to bargain collectively with the Union upon request (A. 52-54, 56).

In May 1966, the Court of Appeals for the District of Columbia Circuit sustained the Board's unfair labor practice finding, and enforced its order (A. 57-78). Although the court rejected the Union's suggestion that the order should include a specific reference to the Company's obligation with respect to the check-off, it noted that, in view of the finding that the Company's refusal was for the purpose of frustrating agreement with the Union, "[t]o suggest that in further bargaining * * * the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (A. 66-67, n. 16). The

² Judge Wilbur K. Miller dissented from this and the subsequent decisions of the court of appeals in this case.

³The court noted that the Trial Examiner had stated that his decision did not necessarily require the Company, in the resumed bargaining negotiations, to agree to some form of check-off (A. 51, n. 9). It concluded that this statement should be disregarded because it is inconsistent with the finding that "the company's refusual to grant a check-off was 'for the purpose of frustrating agreement with the Union and hence [the company had] engaged in bad faith bargaining." (A. 66, n. 16).

court also found it unnecessary to provide in the order that the "union shall have the right to collect dues during non-working hours on non-working areas of the company premises," citing cases indicating that this right is guaranteed by Section 7 of the Act (A. 67, n. 18). The Company's petition for a writ of certiorari was denied, 385 U.S. 851.

B. THE PRESENT PROCEEDING

When the contract negotiations were resumed, each side urged a different interpretation of the court of appeals' decree. The Company contended that the decree left it free to continue to refuse a checkoff provision provided it was willing to bargain about alternative methods of dues collection. The Union, on the other hand, asserted that the Company was obligated to agree to a checkoff provision (A. 118-119; 83-85). Thus, the Company continued to refuse a checkoff on the ground that this was "union business" (A. 84, n. 1), and proposed discussions concerning the possibility of making available a table in the payroll office for the collection of dues; while the Union argued that the court's opinion expressly recognized that employees have a statutory right to have dues collected in non-working areas of the plant during nonworking hours, and that the checkoff provision was an additional and separate matter (A. 118-119; 103-104). Agreement was ultimately reached on all issues except the checkoff, and a contract was entered into effective

⁴ Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793; National Labor Relations Board v. Walton Mfg. Co., 289 F. 2d 177 (C.A. 5).

December 1, 1966 (A. 85, 91-92; Pet. Br. 8). The parties agreed to resolve the checkoff issue in accordance with the court's decree, but were unable to agree on what the decree meant (A. 85).

Accordingly, in February 1967, the Union filed a motion in the court of appeals for clarification of its enforcement decree (A. 81–87). The court initially denied the motion, suggesting that contempt proceedings would be a more appropriate means to test the Company's compliance with the decree (A. 109–110). When the Board declined to institute contempt proceedings, the Union renewed its motion to clarify the decree (A. 101–108). The court of appeals then granted the motion, issued a supplemental opinion, and remanded the case to the Board for reconsideration in light of that opinion (A. 115–130).

The court stated that it did not read "Section 8(d) as prohibiting the Board from ordering a company, which has repeatedly flouted its Section 8(a) (5) duty, to make meaningful and reasonable counteroffers, or indeed even to make a concession where such counteroffers or such a concession would be the only way for the company to purge the stain of bad faith that has already soiled its position" (A. 122). The court added: "Since the company had conceded that it had no business reason for refusing the check-off, it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union on wages or insurance—the two issues besides checkoff that remained in dispute. Indeed, it is possible that in an

appropriate case the Board could simply order the company to grant a checkoff" (A. 123).

on remand, the Board concluded, in accordance with the court's rationale, that an order requiring the Company to grant a checkoff was warranted in the circumstances of this case (A. 135). The Board determined that since the Company's refusal to agree to a checkoff provision was motivated solely by an unlawful purpose, the Company should not be permitted to persist in its refusal in order to extract concessions from the Union on other issues (*ibid.*). Accordingly, the Board entered a supplemental order which included a requirement to grant a checkoff (A. 136–137). The court of appeals enforced that order (A. 140–141).

ARGUMENT

INTRODUCTION AND SUMMARY

The question presented here is whether—upon finding that an employer's rejection of a dues checkoff proposal, which clearly involves a term or condition of employment and thus is a mandatory bargaining subject, was not made in good faith, but was the latest step in a long-term scheme to frustrate agreement with the union—the Board may properly order the employer to grant the checkoff as a remedy for the violation of Section 8(a)(5). That question turns principally on the scope of the Board's remedial power under Section 10(c) to order such "affirmative action * * * as will effectuate the policies of this Act."

The appropriateness of the Board's remedy in this case must be assessed in the context of the Company's unfair labor practice and its effect on the collective bargaining relationship between the parties, which the Act primarily is designed to promote.

The record fully supports the finding of the Board and the court of appeals that the Company refused the checkoff solely to frustrate agreement with the Union. The evidence establishes both the Company's history of had faith negotiations with the newly certified Union and its admitted lack of any valid reason for the refusal to check off union dues, which was confirmed by the fact that it made payroll deductions for other purposes at the Danville plant and had granted a checkoff to other unions at its other plants. Nor, it should be emphasized, did the Company ever seek a bargaining concession from the Union in return for a checkoff at Danville. Its chief negotiator frankly acknowledged that the Company had refused a checkoff or any proposal that would permit the collection of dues in the plant, solely on the ground that it was "not going to aid and comfort the union" at Danville. In view of all these circumstances, plus the fact that the special situation existing at the Danville plant (see p. 4, supra) made it unlikely that the Union would accept a contract without a checkoff provision, the Board was justified in concluding that the Company's rejection of the checkoff was motivated not by business considerations or considerations of bargaining strategy (see Pet. Br. 26) but solely by a desire to avoid reaching any agreement with the Union.

This case illustrates the difficulty faced by the National Labor Relations Board in fashioning an effective remedy to deal with an employer who repeatedly refuses to bargain with the Union about a particular subject, in a context where such refusal is motivated not by an economic or other valid justification but rather by the wish to avoid reaching any agreement with the Union. In the typical situation of an employer who refuses to bargain on the mistaken ground that he was not required to do so, an order directing him to bargain usually suffices to cure the violation; pursuant to such order the employer then bargains and thereby effectuates the statutory policy. Even in that situation, however, the Board is not limited merely to ordering an employer to bargain; where the employer has taken unilateral action in a situation that required prior bargaining, he may be directed to rescind that action and restore the status quo if necessary to make the bargaining meaningful. Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, 215-217.

The problem of devising an effective remedy is far more complex, however, where the employer concedes that the particular matter is a mandatory subject of bargaining, but nevertheless refuses to bargain about that subject solely because, as the Board found in this case, he desires to avoid an agreement with the union. If in such circumstances the Board merely enters its typical bargaining order, that remedy invites, as this case illustrates, another round of administrative and judicial proceedings in which the employer seeks to defend his continued recalcitrance

on the ground that his conduct, which was not sufficient to show good faith bargaining in the past, somehow suffices when it is done pursuant to a bargaining order. Such additional delay would undermine the statutory purpose of creating a viable environment wherein the parties to a labor dispute may resolve their differences through good faith bargaining.

In this exceptional type of case, the practical realities are that the only way in which the employer can now demonstrate his good faith is by giving the union what it seeks; for by definition we are dealing with a situation in which the employer has offered no valid justification for its refusal to make the concession. In the present case, for example, the employer was making other payroll deductions and had agreed to dues checkoffs with other unions at other plants; his sole asserted justification for refusing a dues checkoff here was that he was "not going to aid and comfort the union" at the Danville plant (A. 32).

Thus, since the Company's only reason for withholding a checkoff was to prevent agreement with the Union, the conventional remedy of ordering the Company to bargain in good faith, without more, would compound, rather than dissipate, the injury to the collective bargaining process caused by the Company's unfair labor practice. It would make "a mockery of the collective bargaining required by the statute," as the court of appeals stated (A. 67, n. 16), to permit the Company to return to the bargaining table with old or new

rationalizations for refusing the checkoff. The Company's conduct has placed it in a position where it can have no valid reason for withholding a checkoff at this time. In these circumstances, an order requiring the Company to grant a checkoff is a forthright and appropriate means of restoring the situation, as nearly as possible, to that which most probably would have obtained but for the Company's unfair labor practices. Moreover, such a remedy discourages the employer from unlawful conduct by depriving him, to the extent possible in a subsequent proceeding, of the advantage he sought to gain by attempting to frustrate the collective bargaining negotiations.

In this case the Board made its order precise and meaningful by specifying the action which the Company must take to satisfy its bargaining obligation, i.e., it must demonstrate its good faith by agreeing to the Union's demand for a procedure that is widely accepted in industry and to which it had offered no valid objection. The contention is made, however, that such an order violates Section 8(d) of the Act, which, after defining the obligations that the duty to bargain collectively imposes upon employers and unions, states that "such obligation does not compel either party to agree to a proposal or require it to make a concession." That limitation upon the duty to bargain, however, is designed to prevent the Board from finding a refusal to bargain solely because of the refusal of one side or the other to make a concession. It does not control the different issue involved here of whether. when the refusal to bargain has been established the Board may direct the employer to agree to a contract term where, as a practical matter, that is the only way he can demonstrate that he is now bargaining in good faith. In these exceptional circumstances, Section 8(d) does not bar such a remedy.

IN THE CIRCUMSTANCES OF THIS CASE, THE BOARD DID NOT EXCEED ITS AUTHORITY, UNDER SECTION 10(0) OF THE ACT, BY ORDERING THE COMPANY TO GRANT THE UNION A CHECKOFF PROVISION IN THE CONTRACT

A. THE BOARD'S SUPPLEMENTAL ORDER IS AN APPROPRIATE REMEDY FOR THE COMPANY'S UNFAIR LABOR PRACTICE

Section 10(c) of the Act empowers the Board, upon finding that an unfair labor practice has been committed, to order the respondent to cease and desist from the violation found and "to take such affirmative action * * * as will effectuate the policies of this Act." "This grant of remedial power is a broad one." National Labor Relations Board v. Strong, 393 U.S. 357, 359. See also National Labor Relations Board v. J. H. Rutter-Rex Mfg. Co., No. 32, this Term, decided December 15, 1969, slip opinion, p. 4. The Board may

In Strong, the Court sustained a Board order requiring the employer retroactively to pay certain benefits provided for under a contract which he had unlawfully refused to sign. See also Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, 216 (employer ordered to resume maintenance work "contracted out" without bargaining with the union, and to reinstate affected employees with back pay); National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 250 (disestablishment ordered of labor organization in whose formation employer had unlawfully interfered); National Licorice Co. v. National Labor

properly seek to restore "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices]." Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194. "The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' Virginia Elec. & Power Co. v. Labor Board, 319 U.S. 533, 540." Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, 216.

The Board's order requiring the Company to grant the Union a checkoff provision is consistent with these principles. Since the Company's only reason for withholding a checkoff was to frustrate an agreement with the Union, it had placed itself in a position where the conventional order to bargain in good faith respecting

Relations Board, 309 U.S. 350, 361-366 (employer ordered to cease giving effect to individual contracts secured through unfair labor practices, and to notify employees they were released from obligations imposed by those contracts); Virginia Electric & Power Co. v. National Labor Relations Board, 319 U.S. 533, 538-544 (dues paid to employer-dominated labor organization reimbursed to employees from whose wages they had been withheld under closed-shop, checkoff arrangement); Int'l Ladies' Garment Workers' Union v. National Labor Relations Board. 366 U.S. 731, 736, 739-740 (employer ordered to withdraw recognition from union that lacked majority support when originally recognized, and to cease giving effect to collective bargaining agreement executed with that union after it had secured a majority); Franks Brothers Co. v. National Labor Relations Board, 321 U.S. 702, and National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575, 610-613 (employer ordered to bargain with union, notwithstanding its loss of majority where such loss was attributable to the employer's unfair labor practices).

a checkoff was virtually meaningless; for the Company could not continue to resist a checkoff for the reasons presented before, which were found to have been offered in bad faith, and, as the court below observed, "[t]o suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (A. 66-67, n. 16).

Thus, this is not a case in which the Board has determined that bargaining for the inclusion or exclusion of a particular contract term is "per se" a violation of the Act. Cf. National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, 404-405. A mere refusal to agree to a dues checkoff is not unlawful, nor was that the basis of the decision here. See A. 123; General Asbestos & Rubber Division, Raybestos-Manhattan, 168 NLRB No. 54, 67 LRRM 1012, 1013-1014; McLane Co., 166 NLRB No. 127, 65 LRRM 1729. Nor is this a case where the employer was willing to reach and sign an agreement with the union, but was found to have bargained in bad faith only with respect to the checkoff proposal. Cf. United Steelworkers v. National Labor Relations Board (Roanoke Iron & Bridge Works, Inc.), 390 F. 2d 846

⁶ In the negotiations which occurred after the court of appeals' first decision enforcing a Board order which, in terms, only required the Company to bargain collectively with the Union, the Company continued to oppose a checkoff on the ground that it was "union business," essentially the same reason which it had advanced earlier; it offered merely to discuss proposals whereby the Union might collect dues in the plant during non-working time, a right which the Union could assert independently under Section 7 of the Act (supra, p. 6, and n. 4).

(C.A. D.C.), certiorari denied, 391 U.S. 904.' Rather, the Section 8(a) (5) violation found here reflected the employer's intent of avoiding any agreement with the Union; the Company's rejection of the checkoff was simply the latest means used to accomplish this objective (see A. 123). This conclusion is not altered by the fact that the parties subsequently entered into a contract without a checkoff provision, for they reserved their position on that issue pending a legal resolution of the controversy over the meaning of the court of appeals' decree (supra, pp. 6-7). See Electrical Workers v. National Labor Relations Board, 328 F. 2d 723, 726-727 (C.A. 3).

In the circumstances of this case, therefore, there were three alternative remedies available to the Board:

(1) to require the Company to grant a checkoff pro-

In that case, the Board found that the company had bargained in bad faith on the issue of the checkoff, although it was otherwise willing to reach an agreement with the union, and had, in fact, signed one. The Board premised its finding on evidence that the company refused to grant the checkoff because it believed that the union could not survive without a checkoff and hoped to destroy the union by denying it this benefit. Approving this finding, the court of appeals (Judge Burger dissenting) held: "Entering or conducting negotiations with the intent to destroy the other party would appear to be the archetypal example of a violation of the requirement that the parties must act in good faith." 390 F. 2d at 851, Judge Burger rejected this view of the evidence. However, he distinguished the instant case on the ground that here "there was a past history of findings of bad faith bargaining, and the trial examiner found that the refusal to agree to a checkoff was 'for the purpose of frustrating agreement with the Union, i.e., frustrating any agreement"; the reliance "on the lack of a valid reason for the refusal was directed toward the determination of whether the intransigence was designed to frustrate all negotiation." Id. [emphasis in original).

vision; (2) to require it to grant such a provision provided the Union offered a reasonable concession therefor; or (3) to enter a general order to bargain in good faith and attempt, through subsequent contempt proceedings, to compel the Company to take steps 1 or 2 (see Chamber of Commerce Br. 9-10).

The third alternative is the least satisfactory. If the grant of a checkoff is necessary to show good faith in the particular factual situation here, the interests of all parties would be better served by having the precise nature of the Company's obligation delimited in a Board order, rather than in the uncertain process of post-decree contempt proceedings. Similarly, the imposition of such a specific affirmative remedy in the first instance by the Board is consistent with the congressional determination entrusting the formulation of remedies to the expertise of the administrative agency. Indeed, it is pure formalism to suggest that a direct order to grant a checkoff contravenes the

⁸ The Board declined to institute contempt proceedings because its original order did not specifically require the Company to grant a checkoff, and the court of appeals, in enforcing that order, had declined the Union's request to add such a requirement. The Board was doubtful whether, in these circumstances, either its order or the court's decree gave the Company sufficient notice that, in the subsequent negotiations, it was required to grant a checkoff provision. However, when the court of appeals, in its subsequent opinion, made plain that the Board could properly order a checkoff, the Board, agreeing that such a requirement was appropriate here, entered a revised order specifically requiring the Company to grant the Union a checkoff clause in the collective agreement.

A contempt proceeding based on a general bargaining order is not an effective substitute for a Board order precisely delimiting the conduct required to undo the employer's previous violations of the Act. Where the "order imposes only a general good faith obli-

policies of the Act, while enforcement of exactly the same obligation through a contempt proceeding does not.

The second alternative, permitting the Company to extract a "reasonable concession" from the Union in exchange for the checkoff, would have interjected an element which the Company at no time had suggested was a ground for withholding agreement to a checkoff. The Company's agreement to a contract in December 1966, which resolved all of the outstanding issues between the parties except the checkoff, confirmed that, in the present case, the employer was not demanding any concession on the part of the Union as a quid pro quo for a checkoff. In these circumstances and in view of the unlawful purpose of the Company's refusal to agree to the checkoff, the Board was justified in concluding that it should not be permitted to continue its refusal in order to obtain concessions from the Union on other issues that already had been settled.

On balance, therefore, the Board reasonably determined that the first alternative—an unconditional checkoff requirement—was the best means of restoring the situation to that which would have obtained but for the Company's bad faith bargaining. Since the Company had no business justification for refusing a dues checkoff, and, indeed, had granted a checkoff to other unions at its other plants, it is probable that, except for its illegal motive, it would have agreed to

gation, to establish contempt the Board must prove that since the order's enforcement the guilty party has again exhibited the elusive characteristics of 'subjective bad faith.'" Note, The Need For Creative Orders Under Section 10(c) of the National Labor Relations Act, 112 U. Pa. L. Rev. 69, 85 (1963).

a checkoff provision here. The validity of this assumption is reinforced by the fact, noted by the court of appeals, that a checkoff is generally "of no consequence whatsoever to the employer," and thus such provisions are "included in 92 per cent of all manufacturing industries labor contracts" (A. 128–129). Cf. National Labor Relations Board v. Katz, 369 U.S. 736, 747 (unilateral action by an employer "will rarely be justified by any reason of substance").

To be sure, the probability that the Company would have granted a checkoff provision had it originally bargained in good faith is not as high as it is where an employer has agreed to certain contract benefits and then unlawfully refuses to execute the contract. See H. J. Heinz Co. v. National Labor Relations Board, 311 U.S. 514; National Labor Relations Board v. Strong, 393 U.S. 357. However, where unfair labor practices have been committed, it is not always possible to say with absolute assurance what the situation would have been absent the illegal action. In such cases, the Board must of necessity make a determination based upon probabilities to restore "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices]" (Phelps Dodge Corp., supra, 313 U.S. at 194, emphasis added). Its judgment will be accepted so long as it has a reasonable basis in experience and it effectuates the policies of the Act. See National Labor Relations Board v. Seven-Up Bottling Co., 344 U.S. 346.

Thus, in Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, the employer, without first bargaining with the union,

contracted out the work of about 70 maintenance employees in the expectation of saving about \$225,000 annually in labor costs. The Board, as a remedy for the refusal to bargain, ordered the employer, inter alia, to terminate its contract, to resume the maintenance work by its employees, and to offer the terminated employees reinstatement with back pay. The emplover challenged the order on the ground that, in view of the large economic savings effected by the contract, it was extremely unlikely that management would have agreed not to contract out the work even had it bargained with the union, and, therefore, that the order was unduly burdensome. The Court sustained the order, however, finding no basis for disturbing the Board's conclusions that "restoring the status quo ante [was necessary] to insure meaningful bargaining" and that its "order would not impose an undue or unfair burden" on the employer. 379 U.S. at 216.

In the present case, on the other hand, nothing is required of the Company other than to grant a checkoff, which was withheld only for an unlawful purpose and without economic justification. Moreover, it certainly is more probable—given the finding that the checkoff was withheld solely to prevent agreement—
that the Company would have agreed to a checkoff had it been bargaining in good faith, than it is that the employer in *Fibreboard* would have agreed to forgo the economic savings effected by contractingout had he bargained with the union before taking that action.

The Board's supplemental order in this case may he justified as an appropriate exercise of the Board's remedial power not only on the ground that it is reasonably calculated to restore the likely status quo. but also because it is a reasonable means of fully eradicating the effects of the Company's unlawful refusal to bargain. The Company has engaged in a protracted effort to undermine the Union, which was inevitably weakened by the five-year delay in securing a contract. The checkoff remedy not only removes that issue as a justification for a continuing refusal to agree to a contract, but it also serves to discourage such unlawful conduct by depriving the Company of some of the advantage which it gained by unlawfully weakening the Union. Although the employees must still voluntarily authorize the checkoff, the availability of a contractual checkoff procedure may, in some measure, restore the Union's stature with the emplovees as their elected statutory representative, and provide it with the prompt and regular flow of dues needed to maintain a vigorous grievance procedure.10 The courts of appeals have consistently sustained reonirements in Board orders which go beyond what a respondent would have agreed to in collective bargaining where they are appropriate and necessary fully to eradicate the effects of the unfair labor practices found.11

00

10

er

e-

i-

n-

in

ae

nt

m

at

S-

B-

ne

ul

m

at

is

k-

se

rhe

ff

at

to

g-

ng

¹⁰ See p. 4, supra.

¹¹ See, e.g., Int'l Union of Electrical Workers v. National Labor Relations Board (Scott's, Inc.), 383 F. 2d 230, 232, n. 4 (C.A. D.C.), certiorari denied, 390 U.S. 904 (employer required to assemble its employees on company time and expense, to

The Company disputes this rationale, contending (Br. 21) that, to the extent that the order has the effect of restoring the Union's status, it is directed to the protection of union interests rather than employee rights. But the employees chose this Union to represent them and the Company unlawfully sought to undermine their choice from the outset. An order remedying that violation by enabling the Union to regain its strength plainly vindicates the employees'

allow the union to give a presentation of its position); J. P. Stevens & Co. v. National Labor Relations Board, 406 F. 2d 1017, 1022-1024 (C.A. 4) (employer required to furnish employees' names and addresses to union seeking to organize plants, to facilitate union communication with employees) : Textile Workers Union v. National Labor Relations Board (J. P. Stevens & Co.), 388 F. 2d 896, 904-905 (C.A. 2), (employer required to allow union access to company bulletin boards, and to assemble the employees during worktime so that the Board's notice may be read to them); J. P. Stevens & Co. v. National Labor Relations Board, 72 LRRM 2433, 2434 (C.A. 5), October 3, 1969 (employer required: (1) to give union access to the company bulletin boards for a year; (2) to furnish union a list of names and addresses of all company employees working in plants where the violations occurred; (3) to mail the Board's notice to employees' homes; and (4) to assemble the employees during worktime to have the notice read to them); Montgomery Ward & Co. v. National Labor Relations Board, 339 F. 2d 889, 894-895 (C.A. 6) (employer barred, in the period prior to a Board election, from making anti-union speeches during working hours on his premises without according the union a similar opportunity to address the employees); National Labor Relations Board v. Elson Bottling Co., 379 F. 2d 223, 226-227 (C.A. 6) (employer required to allow union access to company bulletin boards, and an opportunity to address the employees on plant premises in the event of any subsequent anti-union speech by the employer).

right to choose their own representative. Chief Judge Brown stated the correct principle in rejecting a similar contention—i.e., that the "obvious and unabashed objective behind this 'remedy' is to aid the Union in organizing Stevens' employees * * *" (J. P. Stevens, supra, n. 11, 72 LRRM at 2438):

That it may be. But so is a publicized cease and desist order or wild-fire awareness of a reinstatement and backpay order for four employees. See Stevens II [Textile Workers Union of America v. National Labor Relations Board, 388 F. 2d 896] at 905-906 [C.A. 2]. On the surface, this may appear to be making the lot of the Union easier. But, it is being made easier solely because the employer has made that lot harder than the law tolerates.

B. THE BOARD'S SUPPLEMENTAL ORDER DOES NOT CONTRAVENE SECTION $8\,(D)$ OF THE ACT

The Company's principal contention (Br. 12-14) is that, by ordering it to grant a checkoff provision, the Board has compelled it to agree to a proposal or to

¹² Cf. National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575, 610-611: "If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain.' Franks Bros., supra, at 704, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under these circumstances would not be likely to demonstrate the employees' true, undistorted desires." [Footnotes omitted.]

make a concession, in violation of Section 8(d). It relies on the decisions of this Court in National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, and National Labor Relations Board v. Insurance Agents' Int'l Union, 361 U.S. 477.

The qualifying language in Section 8(d) (infra, p.26) precludes the Board, in determining whether there has been a refusal to bargain in good faith, from drawing an inference of bad faith solely because one party has not agreed to the other's proposals or made a concession. or because the Board believes that a party's bargaining proposals are unreasonable. However, the substance of the bargaining proposals is not wholly irrelevant even to that issue, for as Judge Magruder has pointed out, "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." National Labor Relations Board v. Reed & Prince Mfg. Co., 205 F. 2d 131, 134 (C.A. 1), certiorari denied, 346 U.S. 887. Similarly, this Court recognized in Insurance Agents', supra, 361 U.S. at 486, that: "Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." See also Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1419-1422 (1958).

In fashioning appropriate remedies under Section 10(c) of the Act, the Board must take into account

the policy of Section 8(d). The Board could not use its remedial power to compel a party to agree to a contract proposal which it was lawfully opposing and which is unrelated to the unfair labor practice found. But, where, as here, the Board has found on ample evidence, that a party has taken a bad faith or otherwise impermissible 18 bargaining position, the freedom of contract policy embodied in Section 8(d) is not contravened by requiring the party to give up that illegal position, or, where consent to a particular proposal has been withheld solely for a bad faith reason, by requiring acceptance of that proposal. Nothing in Section 8(d) permits a party to refuse to agree to a pronosal for a reason which violates the statute. In these circumstances, where the contract proposal is not of the type which ordinarily would be modified as a result of further negotiations and, indeed, it is clear that the party has no valid reason for opposing it, to compel acceptance of the proposal is not to force a concession in violation of Section 8(d). See Note, Forced Concession

¹³ See National Labor Relations Board v. Borg-Warner Corp., 356 U.S. 342 (insistence on subjects outside the area of mandatory bargaining); cf. National Labor Relations Board v. Katz, 369 U.S. 736 (unilateral changes in mandatory bargaining subjects while contract negotiations are in process).

¹⁴Contrary to the Company's contention (Br. 15), there is no inconsistency between the Board's present position and the position which it took in opposition to the Company's petition for certiorari to review the decision of the court of appeals sustaining the Board's original order. To be sure, the Board pointed out that that order did not, in terms, require the Company to agree to a checkoff (Br. in Opp., No. 392, O.T. 1966, p. 7). However, the Board added that the Company's past refusals to bargain might have put it in a position that it could demonstrate its good faith only by making a concession on the subject of checkoff. The Board concluded that, even in that

as a Possible NLRB Remedy, 68 Colum. L. Rev. 1192, 1195-1196, 1199 (1968).

The court of appeals thus correctly rejected the Company's argument on the ground that "Section 8(d) defines collective bargaining and relates to the determination of whether a Section 8[a](5) violation has occurred and not to the scope of the remedy which may be necessary to cure violations which have already occurred" (A. 123). This rationale is not inconsistent with the prior decisions of this Court on which the Company relies.

In American National Insurance, supra, the Court stated that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." 343 U.S. at 404. However, the Court was not concerned with whether the Board had devised an appropriate remedy under Section 10(c). but rather with the question whether the Board had properly found a refusal to bargain in good faith in violation of Section 8(a)(5). It held that the Board's finding that the employer's insistence on a management function clause was per se a violation of Section 8(a)(5) constituted a judgment on the reasonableness of the employer's bargaining proposal and therefore was contrary to the express command of Section 8(d). As shown (supra, p. 9), the unfair labor practice finding here does not rest on per se grounds.

event, its order would not violate Section 8(d), since the concession would result from the fact that the Company's "own 'performance at the bargaining table' made such a concession the only convincing way by which it could demonstrate its good faith" (id., at pp. 7-8).

Insurance Agents' similarly did not involve a remedial question, but rather a determination whether there was a violation of the collective bargaining obligation by a labor organization.18 The precise question presented was "whether the Board may find that a union, which confers with an employer with the desire of reaching agreement on contract terms, has nevertheless refused to bargain collectively * * * solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying on of the employer's business" (361 U.S. at 479). The Court answered that question in the negative; it concluded, inter glia, that, if "the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid * * *, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract" (id., at 490). No similar problem is involved here, since the Board's finding that the Company withheld a checkoff in bad faith was not based on any judgment respecting the bargaining strength or economic weapons utilized by the parties, but rather on evidence which fully warranted the conclusion that the Company was solely motivated by a desire to prevent an agreement with the Union.16

¹⁵ Section 8(b)(3) of the Act imposes on a labor organization the same duty to bargain in good faith with the employer as Section 8(a)(5) imposes on the employer respecting negotiations with the employees' representative.

¹⁶ The other cases cited by the Company (Br. 17) are similarly distinguishable. *National Labor Relations Board* v.

In sum, the requirement that the Company in the present case must agree to a checkoff provision is not attributable to any judgment by the Board that checkoff is beneficial in this particular labor-management relationship—the evil which the "concession" clause in Section 8(d) sought to guard against. Rather, it results from the fact that the Company, by its prior bad faith bargaining on that issue, left itself with no lawful reason for continuing to withhold a checkoff. In these particular circumstances, to require the grant of a checkoff is, as we have shown, an appropriate exercise of the Board's remedial authority under Section 10(c) of the Act."

American Aggregate Co., 335 F. 2d 253 (C.A. 5), National Labor Relations Board v. Lewin-Mathes Co., 285 F. 2d 329 (C.A. 7), and National Labor Relations Board v. United Clay Mines Corp., 219 F. 2d 120 (C.A. 6), all involve the evidentiary determination whether an employer's bargaining was in bad faith. Retail Clerks International Ass'n v. National Labor Relations Board, 373 F. 2d 655 (C.A. D.C.), involved the factual question whether an agreement had been reached between the employer and union, which the employer then refused to sign.

17 See also National Labor Relations Board v. Beverage-Air Co., 402 F. 2d 411, 417, enforcing 164 NLRB 1127 (union given

Co., 402 F. 2d 411, 417, enforcing 164 NLRB 1127 (union given option of requiring extension of the term of a contract which had expired by the time the employer's unlawful refusal to execute it had been adjudicated); cf. National Labor Relations Board v. Warrensburg Board & Paper Corp., 340 F. 2d 920, 925 (C.A. 2); Local 80, Sheet Metal Workers (Turner-Brooks, Inc.) 161 NLRB 229, 237-238, 239 (as a remedy for the union's unlawful insistence on inclusion of an industry promotion fund clause in the collective agreement, union ordered to cease and desist from enforcing the industry promotion fund provisions of the contract and from insisting that the employer make payments into that fund).

CONCLUSION

For the reasons stated the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,

Solicitor General.

JOSEPH J. CONNOLLY,

Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,

Assistant General Counsel,
Marion Griffin,
Attorney,

National Labor Relations Board.

JANUARY 1970.

7 7 142 0

d Far the reasons stated the Samuel of the court

Mappeds about the second

Account to Market

plan and department

the state of the second

The state of the s

the state of the s

100 mg

and the second s

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29

U.S.C., Secs. 151, et. seq.) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

SEC. 8. (a) It shall be an unfair labor practice for

an employer-

- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
- (b) It shall be an unfair labor practice for a labor organization or its agents—
- (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);
- (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the

employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

available to three thing measure and an applicable

SEC. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *



INDEX

P	age
1. Introduction	1
2. The Remedy Invoked Is Not the Only Means of Demonstrating Good Faith and Remedying the Company's Refusal To Bargain	2
* * · · · · · · · · · · · · · · · · · ·	-
3. The Remedy Invoked Is Not Necessary To Restore the "Likely Status Quo" Nor Enable the Union "To Regain Its Strength"	5
4. The Board's Order Contravenes the Freedom of Contract Policy Embodied in Section 8(d) of the Act	7
5. The Existence of "Legitimate Business Justifications" Is an Irrelevant and Dangerous "Touchstone" in the Area of Remedying Refusals To Bargain	10
6. Conclusion	11
AUTHORITIES CITED	
American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) Cooper Thermometer v. NLRB, 376 F. 2d 684 (2nd Cir. 1967)	10
Fibreboard Paper Products Corp. v. NLRB, 379 U.S.	
203 (1964)	9 10
NLRB v. Herman Sausage Co., 275 F. 2d 229 (5th Cir. 1960) NLRB v. Insurance Agents' International Union, 361	, 10
U.S. 477 (1960)	, 10
920 (2d Cir. 1965)	8
Retail Clerks International Association v. NLRB, 373 F. 2d 660 (D.C. Cir. 1967)	6

Page
United Insurance Company v. NLRB, 360 F. 2d 823 (D.C. Cir. 1966) 6 United Steelworkers v. NLRB (Roanoke Iron & Bridge Works, Inc.), 390 F. 2d 846 (D.C. Cir. 1967) 4, 10 Universal Insulation Corp. v. NLRB, 361 F. 2d 406
(6th Cir, 1966)
(1943)
STATUTES:
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.)
Section 8(d)
ARTICLES AND MISCELLANEOUS:
Note, Employer's Refusal To Bargain and the NLRB's Remedial Powers, The H. K. Porter Case, 35 Univ. Chi. L. Rev. 777 (1968)
Wellington, Freedom of Contract and the Collective Bargaining Agreement, 112 Univ. Pa. L. Rev. 467 (1964)

IN THE

Supreme Court of the United States

Остовев Тевм, 1969

No. 230

H. K. Pobter Company, Inc., Disston Division— Danville Works, Petitioner

V.

NATIONAL LABOR RELATIONS BOARD, and UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

1. Introduction

The Chamber previously filed a brief amicus curiae¹ in the instant case to present its views to the Court on the landmark question of labor law here presented: whether the National Labor Relations Board may compel agreement and force concessions as to the terms and conditions of collective bargaining agreements. The brief subsequently sub-

¹The brief was filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

mitted by the Steelworkers Union acknowledges that this very issue—whether the Board has the power "to dictate terms of employment for the future" (Union Br., p. 42)—is in fact, the core question here involved. Elsewhere in its brief, and in the brief of the Board, however, other matters are raised which similarly have significant and farreaching implications and warrant presentation of the Chamber's views.

The Respondents thus assert that this case is an "er. ceptional" one where "the only way in which the employer can now demonstrate his good faith [or "purge itself of contempt"] is by giving the union what it seeks": that a remedy is necessary which will enable "the Union to regain its strength . . . "; that a forced agreement is the only solution here available which "is reasonably calenlated to restore the likely status quo"; and that, in these circumstances, "where consent to a particular proposal has been withheld solely for a bad faith reason", then "the freedom of contract policy embodied in Section 8(d) is not contravened . . . by requiring acceptance of that proposal" (Bd. Br., pp. 11, 21-3, 25; Union Br., p. 37; emphasis added). The Union's brief proceeds to take this argument one step further and suggests that the absence of any "legitimate and substantial business justifications" on the part of an employer for resisting a union demand should be the "appropriate touchstone" to "exact concessions and/or impos[e] agreement" (Union Br., p. 15).

This brief will be addressed to demonstrating why these novel and critical propositions are unsupported in fact and unfounded in law.

The Remedy Invoked Is Not the Only Means of Demonstrating Good Faith and Remedying the Company's Refusal To Bargain

The Chamber's previous brief assumed, arguendo, that the Board and court below properly regarded the H. K. Porter as a recalcitrant employer. It is important to note 18

n

1

r-

10

I-

ρf

e-

10

Q-

3e

18

10

18

0-

n-

is

30

d

ŋ-

iê

d

ıl

that this characterization is, despite its utilization by the Respondents as a motif, open to serious question. The dissent below thus asserted that he had "seldom seen a record so barren of support for the decision [on the merits] of the examiner and the Board" (A. 78)—a position buttressed by the Company's overall good faith conduct; the availability of other effective means, acceptable to the Union, apart from a checkoff, by which it could collect dues; the Board's defective underlying assumption that if

^{*}See the Chamber's previous brief at fn. 4. Thus, as the dissent below observed, subsequent to the Board's initial order, each of the parties withdrew certain bargaining proposals; agreement was reached on eleven of the fourteen items then open; and the lack of complete agreement was the product not only of the resistance on the part of the Company to a checkoff provision but the equally-adamant insistence by the Union that any contract would have to contain such a term (A. 38-9, 68, 76-7). Moreover, following the Board's order in the instant case, and consistent therewith, the Company reached agreement with the Union on other matters far more critical to a collective bargaining relationship, and thus more susceptible of being used to forestall agreement, than a checkoff, i.e., wages and insurance (Union Br., p. 11; A. 85, 91-2). Ironically, it is this very willingness on the part of the Company to agree on all items except for a checkoff which the Board now invokes as the barrier to permitting the Company from seeking a reasonable conession as the quid pro quo for a checkoff (Bd. Br., p. 18).

Both the Board and the Union incorrectly assume that a checkoff was the only "feasible" procedure whereby the Union could
obtain effective collection of dues (Bd. Br., p. 4; Union Br., p. 4).
This contention ignores the existence of a Union mailing address
in Danville (A. 45, 69), the financial justification for establishing
an additional office if necessary (A. 69), the asserted availability
under the Act of the Union's right to collect dues during nonworking hours on non-working areas (A. 67, n. 18), and the
Union's expressed willingness to accept alternative means of dues
collection other than checkoff (A. 21, 25, 47). Since the Union
was agreeable to such alternatives prior to the Board's order, and,
in fact, proposed them to the Company, it cannot now be asserted
that such alternatives would not be "feasible" and would create
"an unsurmountable practical problem."

an employer does not have a "business" reason for declining to grant a checkoff, he must then necessarily be motivated by an unlawful desire to avoid reaching an agreement (Bd. Br., pp. 9-10), an assumption which disregards the numerous other lawful reasons which may have led to the employer's refusal; and the legitimacy, under the Act, of the Company's refusal "to aid and comfort the union".

Even assuming, however, that the Company has been properly found to have bargained in bad faith, the Respondents seriously distort the basis for that finding. They assert that the only way that the Company can now demonstrate good faith is to grant a checkoff—nothing less will suffice—and that, as a result, the Chamber's suggestion that a contempt proceeding would be the appropriate and desirable vehicle to secure compliance with the Board order is merely an exercise in "formalism" (Bd. Br., pp. 17-8; Union Br., p. 37).

The Board's finding of bad faith, however, was not based on the premise that the refusal to agree on a checkoff clause was a per se violation of the Act; instead, it was expressly based "on the concatenation of the circumstances taken as a whole" (Bd. Br., p. 15; A. 123). And such "concatenation of circumstances" consisted, as the Board

⁴ See the Chamber's previous brief at fn. 5. See also the dissenting opinion of Mr. Chief Justice Burger (then Judge Burger) in *United Steelworkers* v. NLRB (Roanoke Irion & Bridge Works, Inc.), 390 F.2d 846, 855-7 (D.C. Cir. 1967).

⁸ See Note, Employer's Refusal to Bargain and the NLRB's Remedial Powers, The H. K. Porter Case, 35 Univ. Chi. L. Rev. 771, 784 (1968).

⁶ The Chamber's previous brief also suggested various Board alternative remedies, in addition to the courts' contempt powers, that are more desirable means to cope with the problem of the recalcitrant employer than that adopted in the present case. Chamber Br., pp. 8-9 and n. 35.

de-

be

an

tis.

187

CY.

m-

een Re-

hey

on-

will

ion

and

ard

Br.,

sed

toff

VBS

008

nch

ard

ent-

er)

rks,

B's

777,

ard

ers, the

ım-

examiner and the dissent below made clear, on three senarate factors: (1) the anti-union demeanor of the Company's principal negotiator, Jones; (2) the explanation proferred by Jones for refusing to grant a checkoff, that he did not wish to give aid or comfort to the Union: and (3) the Company's position which tended to "disparage" or "discredit" the Union in the eyes of the employees (A. 49-51, 71-5). Presumably, therefore, the correction of any one or more of these factors would have been sufficient to purge the Company of bad faith-the Company could have replaced Jones with a negotiator who did not have an anti-union animus, as apparently it did (A. 83); it could have articulated reasons for refusing to grant a checkoff which were legitimate or, as it in fact did, suggest bargaining on mutually "convenient, effective, and satisfactory" alternatives (A. 89); or it could have engaged in conduct which indicated that it did not desire to disparage or discredit the Union, as it did when it reached an overall agreement with the Union apart from the checkoff controversy. In short, as the Board apparently believed when it concluded that the Company had complied with its order and that contempt proceedings were not warranted (A. 104-5, 111), there were several avenues for the Company to pursue to demonstrate its good faith and its desire to comply with the Board's order. Granting a checkoff provision was merely one, not the only, of these alternatives.

3. The Remedy Invoked Is Not Necessary To Restore the "Likely Status Quo" Nor Enable the Union "To Regain Its Strength"

The Board argues that a required concession in the instant case restores the "likely status quo since it is probable that, except for its illegal motive, [the Company] would have agreed to a checkoff provision here" (Bd. Br., pp. 18-19, 21). There is no demonstrable evidence, however, upon which this assumption is based. The mere fact that many contacts have such clauses "does not ipso facto make the checkoff issue insignificant. Ninety-six per cent of all

contracts provide for arbitration and 90 per cent for seniority, hardly trivial items." And, in view of the Union's willingness to accept any of several less onerous alternatives, it can surely be assumed that, if forced to make a choice, the Company would have opted for one of these methods of dues collection rather than a checkoff. The principal vice in the Board's argument, however, is that it violates the fundamental precept of the Act that, while "the Board may properly order execution of a contract to which the parties have agreed, it may not order execution of a contract to which it thinks they should have agreed." As Judge Friendly stated in Cooper Thermometer v. NLRB, 376 F. 2d 684, 690 (2nd Cir. 1967):

"A sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of the sort would give insufficient respect to Congress' direction in Sec. 8(d) that the obligation to bargain does not compel either party 'to agree to a proposal or require the making of a concession.'"

The Board's contention that the remedy invoked is necessary to enable the Union "to regain its strength" and deprive "the Company of some of the advantage which it gained by unlawfully weakening the Union" (Bd. Br., pp. 21-3) is similarly specious. If the Union was weakened here, such weakness resulted solely from its inability to successfully strike to obtain a checkoff—a disparity of bargaining power which the Act was clearly not designed to

⁷ Note, Employer's Refusal to Bargain and the NLRB's Remedial Powers, The H. K. Porter Case, 35 Univ. Chi. L. Rev. 777, 784 (1968).

⁸ Retail Clerks International Association v. NLRB, 373 F.2d 660 (D.C. Cir. 1967) (footnotes omitted). Cf. United Insurance Company v. NLRB, 360 F.2d 823 (D.C. Cir. 1966).

equalize. This Court thus observed in NLRB v. Insurance Agents' International Union, 361 U.S. 477, 490 (1960) that:

0

8

t

0

d

t

3.

d

0

-

Ô

"... if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations".10

4. The Board's Order Contravenes the Freedom of Contract Policy Embodied in Section 8(d) of the Act

The Chamber's previous brief argued that as the Board's remedial powers under Section 10(c) are necessarily conditioned by the limitations which inhere in the basic policies of the Act, such powers may not be utilized in derogation of the express language of Section 8(d) which precludes the Board from compelling "either party to agree to a proposal or require the making of a concession" (Chamber Br., pp. 4-7). The Board's brief accepts, as it must, this fundamental proposition, but then urges that since "[n]othing in Section 8(d) permits a party to refuse to agree to a proposal for a reason which violates the statute . . . to compel acceptance of the proposal is not to force a concession in violation of Section 8(d)" (Bd. Br., pp. 24-5). The logic of this argument, however, is difficult to fathom. While Section 8(d) obviously does not confer

^{*}See Note, Employer's Refusal to Bargain and the NLRB's Remedial Powers, The H. K. Porter Case, 35 Chi. L. Rev. 777, 785-6) (1968). It should be noted that when the Union was able to mount a successful strike, it was able to achieve most of its objectives and presumably restore its stature in the eyes of the employees (Union Br., p. 11).

¹⁰ See also Wellington, Freedom of Contract and the Collective Bargaining Agreement, 112 Univ. Pa. L. Rev. 467, 474-7 (1964).

a right upon employers to utilize a bargaining position "as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail," it most assuredly does permit employers to maintain positions "genuinely and sincerely held" regardless of whether they are founded on "either good or bad reasons, or no reason at all." 11

The Union seeks to overcome the clear intent of the prohibition language of Section 8(d) by arguing that "the Board frequently has fashioned remedies which interfere with the policy of 'freedom of contract'..." (Union Br., pp. 25-32). While it is no doubt true that there are some limited restrictions imposed by the Act on an absolute freedom of contract, the authorities relied on by the Union clearly do not sanction the right of the Board to impose consent where no consent exists or dictate bargaining terms where the parties have not agreed to such terms. Indeed, each of the various categories of cases discussed by the Union are premised on the converse proposition of fostering voluntary collective agreements and compelling compliance with agreements freely entered:

a party may not, pursuant to the express requirements of Section 8(d), refuse to execute written contracts incorporating agreements already reached nor obviate such agreements by delaying through litigation such execution until after the contract period has run;

¹¹ NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960).

¹³ See Wellington, Freedom of Contract and the Collective Bargaining Agreement, 112 Univ. Pa. L. Rev. 467, 468 (1964). For example, the parties are not free, by virtue of Section 8(a)(3) and 8(e) of the Act, to contract in any way they wish about union security or "hot cargo" provisions.

¹³ E.g., NLRB v. Warrensburg Board & Paper Corp., 340 F.2d 920 (2nd Cir. 1965).

- (2) a party may not seek to vitiate his voluntary agreement to participate in multi-employer bargaining by engaging in an untimely withdrawal from such a unit;¹⁴
- (3) an employer may not avoid his obligation to seek a good faith agreement with the statutory representative of his employees as to the terms and conditions of employment by unilaterally altering such terms and conditions; 18
- (4) an employer may similarly not dissipate the good faith collective bargaining requirement by engaging in individual bargaining ¹⁶ or bargaining with a union which has not been freely chosen by his employees as their representative;¹⁷ and
- (5) an employer may not seek to avoid the obligations of a bargaining agreement "reasonably related" to his business by exercising his prerogative "independently to rearrange [his] business and even eliminate [himself] as [an] employer." 18

The Board should similarly not be permitted to erode the process of free and voluntary collective bargaining—as it seeks to do in the instant case—by establishing employment terms through government fiat.

¹⁴ E.g., Universal Insulation Corp. v. NLRB, 361 F.2d 406 (6th Cir. 1966).

¹⁵ E.g., Fibreboard Paper Products Corp., v. NLRB, 379 U.S. 203 (1964).

¹⁶ E.g., National Licorice Co. v. NLRB, 309 U.S. 350 (1940).

¹¹ E.g., Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 (1943).

¹⁸ John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

5. The Existence of "Legitimate Business Justifications" Is an Irrelevant and Dangerous "Touchstone" in the Area of Remedying Refusals To Bargain

The Union suggests that unless an employer has an "legitimate and substantial business justifications" for resisting a union's demands, the Board may find a refusal to bargain which it may remedy "by exacting concessions and/or imposing agreement" (Union Br., p. 15). This dangerous proposition is premised on the erroneous assumption that bargaining tactics, such as withholding the grant of an item until a time when there is little else to offer or taking a bargaining position for "trading purposes",19 and the use of other economic weapons,20 have no part to play in the bargaining process. It also ignores the fundamental precept that "deep conviction, firmly held and from which no withdrawal will be made . . . [is] both the right of the citizen and essential to our economic legal system, thus far maintained, of free collective bargaining." 21 As Mr. Chief Justice Burger (then Judge Burger) stated with respect to a similar proposal:

"... once such rule is made, it is quite clear that the Board and the courts are immersed in the substantive terms of the collective bargaining contract. This is not their role and the Supreme Court has been quite clear on this point." 22

¹⁹ See United Steelworkers v. NLRB (Roanoke Iron & Bridge Works, Inc.), 390 F.2d 846, 855-7 (D.C. Cir. 1967) (dissenting opinion).

²⁰ See NLRB v. Insurance Agents' International Union, 361 U.S. 477, 488-9 (1960) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"); American Ship Building Co. v. NLRB, 380 U.S. 300 (1965); and NLRB v. Brown Food Store, 380 U.S. 278 (1965).

²¹ NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960).

²² United Steelworkers v. NLRB (Roanoke Iron & Bridge Works, Inc.), 390 F.2d 846, 856 (D.C. Cir. 1967) (dissenting opinion; footnotes omitted).

6. Conclusion

For the above-stated reasons, as well as those set forth in the Chamber's prior brief, the decision of the court below should be reversed.

Respectfully submitted,

MILTON A. SMITH General Counsel

Anthony J. Obadal

Labor Relations Counsel

Chamber of Commerce of the
United States of America
1615 H Street, N. W.

Washington, D. C.

LAWRENCE M. COHEN

Lederer, Fox & Grove

111 W. Washington Street
Chicago, Illinois 60602

Attorneys for the Amicus Curiae

LEDERER, FOX & GROVE
111 W. Washington Street
Chicago, Illinois 60602
Of Counsel



MOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the pre-

SUPREME COURT OF THE UNITED STATES

No. 230.—OCTOBER TERM, 1969

H. K. Porter Company, Inc., Etc., Petitioner,

υ.

National Labor Relations Board et al. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 2, 1970]

MR. JUSTICE BLACK delivered the opinion of the Court. After an election respondent United Steelworkers Union was, on October 5, 1961, certified by the National Labor Relations Board as the bargaining agent for certain employees at the Danville, Virginia, plant of the petitioner, H. K. Porter Co. Thereafter negotiations commenced for a collective bargaining agreement. that time the controversy has seesawed between the Board, the Court of Appeals for the District of Columbia Circuit, and this Court. This delay of over eight years is not because the case is exceedingly complex, but appears to have occurred chiefly because of the skill of the company's negotiators in taking advantage of every opportunity for delay in an act more noticeable for its generality than for its precise prescriptions. The entire lengthy dispute mainly revolves around the union's desire to have the company agree to "check off" the dues owed to the union by its members, that is, to deduct those dues periodically from the company's wage payments to the employees. The record shows, as the Board found, that the company's objection to a checkoff was not due to any general principle or policy against making deductions from employees' wages. The company does deduct charges for things like insurance, taxes and contributions to charities, and at some other plants it has a checkoff arrangement for union dues. The evidence shows, and the court below found, that the company's objection was not because of inconvenience, but solely on the ground that the company was "not going to aid and comfort the union." Efforts by the union to obtain some kind of compromise on the checkoff request were all met with the same staccato response to the effect that the collection of union dues was the "union's business" and the company was not going to provide any assistance. Based on this and other evidence the Board found, and the Court of Appeals approved the finding. that the refusal of the company to bargain about the checkoff was not made in good faith, but was done solely to frustrate the making of any collective bargaining agreement. In May 1966, the Court of Appeals upheld the Board's order requiring the company to cease and desist from refusing to bargain in good faith and directme it to engage in further collective bargaining, if requested by the union to do so, over the checkoff. United Steelworkers v. NESB 124 U. S. App. D. C. 143, 363 F. 2d 272, cert. denied, 385 5. S. 851.

In the course of that opinion, the Court of Appeals intimated that the Board conceivably might have required petitioner to agree to a checkoff provision as a remedy for the prior bad-faith bargaining, although the order enforced at that time did not contain any such provision. 363 F. 2d, at 275–276, n. 16. In the ensuing negotiations the company offered to discuss alternative arrangements for collecting the union's dues, but the union insisted that the company was required to agree to the checkoff proposal without modification. Because of this disagreement over the proper interpretation of the court's opinion, the union, in February 1967, filed a motion for clarification of the 1966 opinion. The motion

was denied by the court on March 22, 1967, in an order suggesting that contempt proceedings before the Board would be the proper avenue for testing the employer's compliance with the original order. A request for the institution of such proceedings was made by the union, and in June 1967, the Regional Director of the Board declined to prosecute a contempt charge, finding that the employer had "satisfactorily complied with the affirmative requirements of the Order." App., at 111. The union then filed in the Court of Appeals a motion for reconsideration of the earlier motion to clarify the 1966 opinion. The court granted that motion and issued a new opinion in which it held that in certain circumstances a "checkoff may be imposed as a remedy for badfaith bargaining." United Steelworkers v. NLRB, 128 U. S. App. D. C. 344, 347, 389 F. 2d 295, 298 (1967). The case was then remanded to the Board and on July 3, 1968, the Board issued a supplemental order requiring the petitioner to "[g]rant to the Union a contract clause providing for the checkoff of union dues." 172 N. L. R. B. No. 72. The Court of Appeals affirmed this order, H. K. Porter Co. v. NLRB, - U. S. App. D. C. -, 414 F. 2d 1123 (1969). We granted certiorari to consider whether the Board in these circumstances has the power to remedy the unfair labor practice by requiring the company to agree to check off the dues of the workers. 396 U. S. 817. For reasons to be stated we hold that while the Board does have power under the Labor Management Relations Act, 61 Stat. 136, as amended, to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.

Since 1935 the story of labor relations in this country has largely been a history of governmental regulation of the process of collective bargaining. In that year Congress decided that disturbances in the area of labor relations led to undesirable burdens on and obstructions of interstate commerce, and passed the National Labor Relations Act, 49 Stat. 449. That Act, building on the National Industrial Recovery Act, 48 Stat. 195 (1933). provided that employees had a federally protected right to join labor organizations and bargain collectively through their chosen representatives on issues affecting their employment. Congress also created the National Labor Relations Board to supervise the collective bargaining process. The Board was empowered to investigate disputes as to which union, if any, represented the employees, and to certify the appropriate representative as the designated collective bargaining agent. The employer was then required to bargain together with this representative and the Board was authorized to make sure that such bargaining did in fact occur. Without spelling out the details, the Act provided that it was an unfair labor practice for an employer to refuse to bargain. Thus a general process was established which would ensure that employees as a group could express their opinions and exert their combined influence over the terms and conditions of their employment. The Board would act to see that the process worked.

The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, hopefully, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own

views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The Senate Committee on Education and Labor stated:

"The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." 1

The discussions on the floor of Congress consistently reflect this same understanding.²

The Act was passed at a time in our Nation's history when there was considerable legal debate over the con-

¹S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1935).

^{2 &}quot;Let me say that the bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees.

[&]quot;Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit hours of work, or to effect or govern any working condition in any establishment or place of employment.

[&]quot;A crude illustration is this: The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded." Remarks of Senator Walsh, 79 Cong. Rec. 7659, 74th Cong., 1st Sess. (1935); see also 79 Cong. Rec. 9682, 9711.

stitutionality of any law that required employers to conform their business behavior to any governmentally imposed standards. It was seriously contended that Congress could not constitutionally compel an employer to recognize a union and allow his employees to participate in setting the terms and conditions of employment. In NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937), this Court, in a 5-to-4 decision, held that Congress was within the limits of its constitutional powers in passing the Act. In the course of that decision the Court said:

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." Id., at 45.

In 1947 Congress reviewed the experience under the Act and concluded that certain amendments were in order. In the House committee report accompanying what eventually became the Labor Management Relations Act of 1947, the committee referred to the above quoted language in Jones & Laughlin and said:

"Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make.

[U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements." a

Accordingly Congress amended the provisions defining unfair labor practices and said in §8 (d) that:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotionation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." *

In discussing the effect of that amendment, this Court said it is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." NLRB v. American Ins. Co., 343 U. S. 395, 404 (1952). Later this Court affirmed that view stating that "it remains clear that § 8 (d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements." NLRB v. Insurance Agents, 361 U. S. 477, 487 (1960). The parties to the instant case are agreed that this is the first time in the 35-year history of the Act that the Board has ordered either an employer or a union to agree to a substantive term of a collective bargaining agreement.

Recognizing the fundamental principle "that the National Labor Relations Act is grounded on the premise

*29 U. S. C. § 158 (d) (emphasis added).

³ H. R. Rep. No. 245, 80th Cong., 1st Sess., 19-20 (1947).

of freedom of contract," 389 F. 2d, at 300, the Court of Appeals in this case concluded that nevertheless in the circumstances presented here the Board could properly compel the employer to agree to a proposed checkoff clause. The Board had found that the refusal was based on a desire to frustrate agreement and not on any legitimate business reason. On the basis of that finding the Court of Appeals approved the further finding that the employer had not bargained in good faith, and the validity of that finding is not now before us. Where the record thus revealed repeated refusals by the employer to bargain in good faith on this issue, the Court of Appeals concluded that ordering agreement to the checkoff clause "may be the only means of assuring the Board, and the court, that [the employer] no longer harbors an illegal intent." 389 F. 2d, at 299.

In reaching this conclusion the Court of Appeals held that § 8 (d) did not forbid the Board from compelling agreement. That court felt that "[s]ection 8 (d) defines collective bargaining and relates to a determination of whether a . . . violation has occurred and not to the scope of the remedy which may be necessary to cure violations which have already occurred." 389 F. 2d. at 299. We may agree with the Court of Appeals that as a matter of strict, literal interpretation of that section it refers only to deciding when a violation has occurred. but we do not agree that that observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8 (d). It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while §8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

In reaching its decision the Court of Appeals relied extensively on the equally important policy of the Act that workers' rights to collective bargaining are to be secured. In this case the Court apparently felt that the employer was trying effectively to destroy the union by refusing to agree to what the union may have considered its most important demand. Perhaps the court, fearing that the parties might resort to economic combat, was also trying to maintain the industrial peace which the Act is designed to further. But the Act as presently

^{5&}quot;If . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any . . . unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U. S. C. § 160 (c).

⁶ For example, the employer is not free to choose any employee representative he wants, and the representative designated by the majority of the employees represents the minority as well. The Act itself prohibits certain contractual terms relating to refusals to deal in the goods of others, 29 U. S. C. § 158 (e). Various practices in enforcing the Act may to some extent limit freedom to contract as the parties desire. See generally Wellington, Freedom of Contract and the Collective Bargaining Agreement, 112 U. Pa. L. Rev. 467 (1964).

drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, nor that strikes and lock-outs will never result from a bargaining to impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining. It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process.

The judgment is reversed and the case is remanded to the Court of Appeals for further action consistent with

this opinion.

Reversed and remanded.

Mr. JUSTICE WHITE took no part in the decision of this case.

Mr. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 230.—OCTOBER TERM, 1969

H. K. Porter Company, Inc., Etc., Petitioner,

v.

National Labor Relations Board et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 2, 1970]

Mr. JUSTICE HARLAN, concurring.

I join in the Court's opinion on the understanding that nothing said therein is meant to disturb or question the primary determination made by the Board and sustained by the Court of Appeals, that petitioner did not bargain in "good faith," and thus may be subjected to a bargaining order enforceat! oy a citation for contempt if the Board deems such a proceeding appropriate. TERMINE OF THE ENTERN STATES

The set much the state of

SUPREME COURT OF THE UNITED STATES

No. 230.—OCTOBER TERM, 1969

H. K. Porter Company, Inc., Etc., Petitioner,

National Labor Relations Board et al. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 2, 1970]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The Court correctly describes the general design and main thrust of the Act. It does not encompass compulsory arbitration; the Board does not sit to impose what it deems to be the best conditions for the collective bargaining agreement; the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." Section 8 (d) of the Act.

Yet the Board has the power, where one party does not bargain in good faith, "to take such affirmative action . . . as will effectuate the policies" of the Act. Section 10 (c) of the Act.

Here the employer did not refuse the checkoff for any business reason, whether cost, inconvenience, or what-not. Nor did the employer refuse the check off as a factor in its bargaining strategy, hoping that delay and denial might bring it in exchange favorable terms and conditions. Its reason was a resolve to avoid reaching any agreement with the union.

In those narrow and specialized circumstances, I see no answer to the power of the Board in its discretion to impose the checkoff as "affirmative action" necessary to remedy the flagrant refusal of the employer to bargain in good faith. The case is rare, if not unique, and will seldom arise. I realize that any principle once announced may in time gain a momentum not warranted by the exigencies of its creation. But once there is any business consideration that leads to a denial of a demand or any consideration of bargaining strategy that explains the refusal, the Board has no power to act. Its power is narrowly restricted to the clear case where the refusal is aimed solely at avoidance of any agreement. Such is the present case. Hence with all respect for the strength of the opposed view, I dissent.

